Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

VALSAMIS, INC. and CHERYL GISENTANER,
Petitioners

v.

CORNHILL INSURANCE PLC,
HANSA MARINE INSURANCE CO. (U.K.) LTD.,
ANGLO AMERICAN INS. CO. LTD., UNDERWRITERS
AT LLOYD'S LONDON, AMERICA'S INS. CO. AND
OCEAN MARINE INDEMNITY CO.
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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130 pp

QUESTIONS PRESENTED FOR REVIEW

1. This is a case in which the mandatory language of Rule 19(b) requiring dismissal of a case where indispensable parties cannot be joined has been ignored. This controversy requires interpretation of five insurance policies in favor of Valsamis, Inc. and the resolution of many complex issues including overlapping and successive coverage; the insurers concurrent and/or conditional respective duties to defend; allocation of liability for agents' admitted failure to forward notice to underwriters; and the availability of unsettled state causes of action. All issues are governed by Texas law. Respondents, underwriters on three of the five policies, invoked federal declaratory jurisdiction on the basis of diversity. Joinder of the remaining policies or the agents responsible for withholding notice defeats diversity.

Petitioners challenged the district court's jurisdiction because these "necessary parties" under Rule 19(a) can not be joined, but are "indispensable" to a complete resolution of the controversy. The district court granted summary judgment on the merits without considering whether it had jurisdiction. The Fifth Circuit affirmed without considering the test required by Rule 19(b) and *Provident Tradesman Bank & Trust Co. v. Lumbermen's Mutual Casualty Co.*, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968). Instead of reviewing jurisdiction *de novo*, which was necessary because of the district court's failure to rule on Petitioners' Motions to Dismiss, the Fifth Circuit ignored the factors mandated by Rule 19(b) and the interests which *Provident* demands be considered. It approved jurisdiction because the district court's ruling on the merits did not rest on issues involving the absent parties. The Fifth Circuit's conduct not only violates fundamental procedural requirements, it ignores the clear precedent in *Provident*, and is oblivious to the *res judicata* effect of the federal ruling on absent parties and issues.

Thus, the questions presented are whether the lower courts' failure to properly consider petitioners' jurisdictional challenge before reaching the merits and whether the Fifth Circuit's failure to

conduct a *de novo* review of jurisdiction or remand, has so far departed from the accepted course of judicial proceedings as to require this Court's exercise of its supervisory power. Despite timely and repeated challenges, no court has addressed the fundamental jurisdictional defects present in this case.

2. Just two years ago, this Court cautioned federal courts not to exercise declaratory jurisdiction when to do so would interfere with the orderly disposition of a pending state court action involving the same parties and are purely questions of state law and reaffirmed the governing standard set out in *Brillhart v. Excess Insurance Company of America*, 316 U.S. 491, 62 S.Ct. 1173. *Wilton v. Seven Falls Co.*, 115 S.Ct. 2137 (1995). In *Wilton*, the district court declined jurisdiction on facts nearly identical to those presented here. Justice O'Connor, writing for a unanimous Court, held that the district court's refusal to exercise jurisdiction was proper because had the court accepted jurisdiction, it would have engaged in "gratuitous interference" with the state law. 115 S.Ct. at 2140-41. Here, petitioners asked the district court to stay or dismiss the federal proceeding in deference to a concurrent parallel state case, which already had jurisdiction over all persons necessary to a complete adjudication of the controversy; the claims of all parties in interest could be fully adjudicated in the state case, but could not be in the federal case; respondents had the same legal defenses open to them in state court; the case turned purely on questions of state law; many of the outcome determinative state issues were unsettled, leaving the federal court with no guiding precedent; and failure to abstain from exercising jurisdiction would subject petitioners to inconsistent results and require duplicitous litigation. Yet, the district court exercised jurisdiction without ruling on the motions. *Brillhart* holds that the district court's failure to consider these factors, and the Court of Appeals' failure to determine whether under controlling state law, the issues could be litigated by the plaintiffs in the state proceeding, required reversal. *Brillhart*, 316 U.S. at 495-496. The district and appellate courts in this case committed the identical errors.

This case presents the opportunity for the Court to make *Wilton*'s discussion regarding when a district court should decline jurisdiction, binding precedent, and to define when exercise of jurisdiction is an abuse of discretion. *Wilton* expressly declined to "delineate the outer boundaries of" the federal courts' discretion under the Declaratory Judgment Act. 115 S.Ct. at 2144. The fact that the same judge (Judge Hittner was also the trial judge in the *Wilton* case) reached opposite results on the same facts, demonstrates the uncertainty with which courts and litigants are still plagued as to the scope of federal jurisdiction under the Declaratory Judgment Act.

Thus, the questions presented are whether exercise of declaratory judgment jurisdiction under 28 U.S.C. § 2201 over objection was an abuse of discretion, and whether the Fifth Circuit had authority or was obligated to conduct a *de novo* review of the jurisdictional issue due to the district court's failure to rule on it despite the "abuse of discretion" standard announced in *Wilton*.

NAMES OF ALL INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

A. Petitioners
Cheryl Gisentaner
Valsamis, Inc.

Corporate Affiliates

Valsamis, Inc. is a privately held corporation with no subsidiary or parent corporations that have issued shares to the public.

Represented by: Joan M. Lucci Bain
Bain & Bain, P.L.L.C.
1535 West Loop South, 4th Floor
Houston, Texas 77027

B. Respondents "The Cornhill Group"
Cornhill Insurance Plc.
Hansa Marine Insurance Co. (U.K.) Ltd.
Anglo American Insurance Company Ltd.
Underwriters at Lloyds
The Prudential Assurance Company, Ltd.
Allianz International Insurance Company Ltd.
Vesta (UK) Insurance Company Ltd.
The Northern Assurance Company Ltd.
Sphere Drake Insurance Plc. No. 1 A/C
Sovereign Marine & General Insurance Company
The Tokio Marine & Fire Insurance Company (UK) Ltd.
The Ocean Marine Insurance Company Ltd.

Corporate Affiliates

1. Cornhill Insurance Company is a wholly-owned subsidiary of Allianz AG, which is publicly on the Frankfurt Stock Exchange. Cornhill has no other subsidiary and/or affiliated corporations that have issued shares to the public.

2. Hansa Marine Insurance Company (U.K.) Ltd is a wholly-owned subsidiary of Trygg Hansa Holding A.B., which is publicly traded on the Stockholm Stock Exchange. Hansa Marine has no other subsidiary and/or affiliated corporations that have issued shares to the public.

3. Prudential Assurance Co. Ltd. is a wholly-owned subsidiary of Prudential Corporation, which is publicly traded on the London Stock Exchange. Prudential Assurance has no other subsidiary and/or affiliated corporations that have issued shares to the public.

4. The Ocean Marine Insurance Company, Ltd. and the Northern Assurance Company Ltd. are wholly-owned by Commercial Union Assurance Company PLC. Commercial Union is wholly-owned by Commercial Union PLC, whose shares are publicly traded on the London Stock Exchange. The Ocean Marine Insurance Co. and Commercial Union Assurance Company has no other subsidiary and/or affiliated corporations that have issued shares to the public.

Represented by: Glenn R. Legge
Legge, Farrow, Kimmit
& McGrath, L.L.P.
5718 Westheimer Road, Suite 1850
Houston, Texas 77057

C. Respondents
Americas Insurance Company
Southern Marine Aviation & Underwriters

Corporate Affiliates

Americas Insurance Company is a private company and its parent company is Sedgwick Group Plc., a publicly traded entity. Americas Insurance Company has no other subsidiary and/or affiliated corporations that have issued shares to the public.

Represented by: Julia M. Adams
Karen K. Milhollin
Phelps Dunbar, L.L.P.
3040 Post Oak Boulevard, Suite 900
Houston, Texas 77056

D. Respondent Ocean Marine Indemnity Company

Corporate Affiliates

Ocean Marine Indemnity Company is a private corporate party and its parent company is Gulf Coast Marine, Inc., a privately owned entity. Ocean Marine Indemnity has no subsidiary and/or affiliated corporations that have issued shares to the public.

Represented by: Ronald L. White
Ronnie W. Baham, Jr.
Brown, Sims, Wise & White
2000 Post Oak Boulevard, Suite 2100
Houston, Texas 77056-4496

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

VALSAMIS, INC. and CHERYL GISENTANER,
Petitioners,

v.

CORNHILL INSURANCE PLC, HANSA MARINE INSURANCE CO. (U.K.) LTD., ANGLO AMERICAN INSURANCE COMPANY LIMITED, UNDERWRITERS AT LLOYD'S LONDON, AMERICAS INSURANCE COMPANY AND OCEAN MARINE INDEMNITY COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHERYL GISENTANER and VALSAMIS INC. respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Southern District of Texas.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 106 F.3d 80 (5th Cir. 1997) *reh. den.*, 110 F.3d 795 (5th Cir. 1997) (App. A & B). The opinions and orders of the United District Courts for the Southern District of Texas, Houston Division are unreported. (App. C-G).

JURISDICTION

The Fifth Circuit entered its judgment affirming the summary judgment of the district court on February 7, 1997 (App. A), and on March 10, 1997, denied Petitioners' Motion for Rehearing and Suggestion of Rehearing *En Banc* filed February 21, 1997. (App. B). The Fifth Circuit issued mandate on April 9, 1997. This petition is being filed on or before June 6, 1997, perfecting this Court's jurisdiction to review the decision of the Fifth Circuit Court of Appeals on writ of certiorari pursuant to 28 U.S.C. § 1254(1) and 2101(c). Petitioners also invoke this Court's jurisdiction pursuant to Supreme Court Rule 10(a) and (c).

STATUTES AND RULES OF PROCEDURE INVOLVED

FRCP 19. JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) Persons To Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (I) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measurers, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Not applicable.

CHAPTER 151—28 U.S.C. DECLARATORY JUDGMENTS

§ 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such

declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) Not applicable.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case in the District Court.

The record in this case will show that this is an anticipatory declaratory judgment action filed by the underwriters on three of five relevant insurance policies insuring Valsamis, Inc. Gisentaner is a judgment creditor and assignee of Valsamis, Inc. The respondents invoked federal jurisdiction pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201 and Federal Rule of Civil Procedure Rule 57 based solely on diversity of citizenship under 28 U.S.C. § 1332. Petitioners have challenged the federal court's jurisdiction in this case by filing motions to dismiss in the district court and raising points of error regarding jurisdiction in the Fifth Circuit.

Gisentaner filed suit against Valsamis, Inc. on October 29, 1992 ("the *Gisentaner* suit").[1] Valsamis, Inc.'s counsel notified its insurers' agent of the *Gisentaner* suit, but none of the insurers provided a defense, issued a reservation of rights letter, or explained their reasons for denying coverage until nearly a year later. Eventually, the *Gisentaner* suit settled for a consent judgment, covenant to delay execution, and a complete assignment of all of Valsamis, Inc.'s rights against its insurers to Gisentaner.

Three of the five Valsamis policies triggered, referred to as the Cornhill, Americas, and OMI policies, are represented in this

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[1] The case was styled *Cheryl Gisentaner v. Dimitrios Valsamis, Christos Papapetrou and Valsamis, Inc.*, Cause No. 92-49457, in the 125th Judicial District Court of Harris County, Texas.

case. The insurer from the other two, employers liability ("EL") policies, cannot be joined because it is not diverse. The EL policy is underwritten by Crum & Forster d/b/a U.S. Fire, a Texas corporation. The Cornhill and OMI policies were sold to Valsamis, Inc. by R. L. Jarrett, Risk Services, Inc. (broker) and Technical Risks, Inc. (agent), both non-diverse Texas Corporations. The OMI policy is an umbrella policy over the Cornhill policies and one of the EL policies. This EL policy was sold to Valsamis, Inc. through Technical Risks.

Prior to the entry of the *Gisentaner* judgment, the underwriters on the Cornhill Policy[2] attempted to intervene and contest the judgment. The state court denied Cornhill's motion, and entered final judgment on February 28, 1994. (R., V. 7, Tab 20, p. 296-302, 322). Less than 30 days later, before the *Gisentaner* judgment became final, underwriters on the primary Cornhill policy instituted this federal declaratory judgment action, seeking a declaration of no coverage and no duty to defend the *Gisentaner* suit. (R., V. 8, Tab 1, p. 58). The underwriters on the Americas and OMI Policies then filed separate declaratory judgment actions seeking the same relief. (R., V. 9, Tab 1, p. 86) (V. 11, Tab 1, p. 119). On June 22, 1994, Gisentaner filed suit in state court against the underwriters on the Americas, Cornhill and OMI policies, as well as the underwriters on the two EL Policies and the two excess Cornhill policies. Gisentaner also sued the broker and agent for the Cornhill, OMI and the EL policies. ("*Gisentaner v. Americas*")[3] One of the EL Policies in *Gisentaner v. Americas* underlies the OMI umbrella policy. Cornhill then amended its complaint in this case

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[2] The "Cornhill Policy" is Valsamis' CGL Policy which was in effect from July 24, 1992 to July 24, 1993. There are two Excess CGL Policies which follow the terms and conditions of the Primary. These are collectively referred to as the "Cornhill Policies."

[3] *Cheryl Gisentaner, Individually and on Behalf of Valsamis, Inc. v. Americas Insurance Company, et al.*, No. 94-29954, pending in the 129th District Court of Harris County, Texas.

to add the underwriters on the two excess CGL policies. All four suits were filed between March 28, 1994 and June 22, 1994.

Gisentaner and Valsamis filed motions to dismiss or stay each of the declaratory judgment cases under FED. R. CIV. P. RULE 19(b). Alternatively, Petitioners argued that the district court should decline declaratory jurisdiction and/or stay the proceedings to allow *Gisentaner v. Americas* to proceed, because the case only presented issues of state law, the state court provided a more comprehensive forum where all parties and facts in controversy could be decided, and the federal plaintiffs had obviously filed their declaratory judgment actions in anticipation of the *Gisentaner v. Americas* suit. (App. M; R., V. 8, pp. 76-112; V.7, pp. 291-335; V.9, pp. 105-140; V. 10, pp. 136-167; and V.11, Tab 7, pp. 127- 135). On September 2, 1994, before the federal cases were consolidated, Judge Gilmore denied Petitioners' Motions to Dismiss the Americas' action. (App. F-G). Judge Gilmore entered her order despite her knowledge of related proceedings before Judge Hittner because of Americas' defective Motion to Consolidate. (R., Vol. 9, p. 183).

On September 19, 1994, Judge Hittner heard Petitioners' Motions to Dismiss, but took the motions under advisement. He also ordered the parties to consolidate the Cornhill, OMI, and Americas cases. (App. E). At the September 19, 1994 hearing, Judge Hittner also indicated he would reconsider Judge Gilmore's September 2, 1994 order denying Petitioners' Motions to Dismiss the Americas cases and rule on the OMI motions to dismiss after consolidation. His minute order promised that an order on the Motions to Dismiss would be issued. (App. E). The cases were consolidated but Judge Hittner never ruled on Petitioners' Motions to Dismiss. (App. O).

Americas, Cornhill and OMI then filed separate motions for summary judgment. Subject to their pending motions to dismiss, petitioners responded and filed cross motions. (R., V. 6, Tab 40, p. 844; V. 3, Tab 54, p. 844; V. 2, Tab 67, p. 1915). Petitioners filed a supplement to the still pending motions in August, 1995.

(App. N). The supplemental motion, Docket Entry #66, only raised a state law issue under the Texas Insurance Code regarding respondents' capacity to sue. The jurisdictional issues are addressed in the original motions. (Docket Entries 11 & 20 in Cause No. 94-1013 (App. O); Docket Entries 8 & 10 in Cause No. 94-1977 (App. P)).

On September 26, 1995, Judge Hittner entered his order granting summary judgment in favor respondents and denying appellants' supplemental motion to dismiss. (App. B & C). The final order and opinion specify that Docket Entry "66" is denied; it does not address petitioners' jurisdictional motions. (App. D, pp. 20a, 27a-28a). There is no order, findings of fact, conclusions of law, or opinion to considering whether to retain jurisdiction under Rule 19, or whether to exercise declaratory jurisdiction despite the existence of the more comprehensive *Gisentaner v. Americas* action.

B. Course of Proceedings and Disposition of the Case in the Court of Appeals.

Petitioners perfected an appeal to the Fifth Circuit. The panel rendered its opinion affirming the district court's judgment on February 7, 1997. (App. A). Despite the fact that Judge Hittner failed to determine whether he had jurisdiction, the Fifth Circuit only cursorily considered petitioners' points of error as to jurisdiction. (App. A, pp. 4a-5a). The Fifth Circuit acknowledges the absent parties are "necessary," but finds them not to be indispensable. The opinion correctly states the four factor test required by Rule 19, but its conclusion that "none of factors cut in favor of joining parties" is without analysis or support. For example, the fact the plaintiffs had an adequate remedy if dismissed (the last factor) is conclusively established by the record, as is the prejudice to petitioners and the absent parties (the first factor). The other two also weigh heavily in support of dismissal. The Fifth Circuit simply failed to apply the mandatory Rule 19(b) test. Instead, the panel "put the cart before the horse" finding that the district court's decision on the merits did not require the absent parties, wholly ignoring the jurisdictional question and the rules under which jurisdiction had to be decided.

The Fifth Circuit also disregarded the strict limitations placed on declaratory jurisdiction by the *Wilton* and *Brillhart* decisions. (App. A, p. 5a). Although the opinion cites *Wilton* and *Brillhart* as authority, its conclusion that the district court did not abuse is discretion is based solely on its prior conclusion that the absent parties were not "indispensable," and a non-existent "district court finding" that the suits were not anticipatory.[4] By doing so, the Fifth Circuit "rewrote" the guiding principles for exercise of declaratory jurisdiction enunciated in *Wilton* and *Brillhart*.

Petitioners filed a Motion for Rehearing and Suggestion for Rehearing *En Banc*, stressing these jurisdictional flaws; however, both motions were denied without opinion on March 10, 1997. (App. B). Petitioners then filed a Motion to Stay Mandate to enable them to present this Petition for Writ of Certiorari, which was denied April 9, 1997.

C. Relevant Facts.

Policies Triggered by the Gisentaner Suit

Gisentaner sought damages against the Valsamis defendants for injuries she sustained during her employment with Valsamis, Inc. from March 1992 through September 2, 1992. In her original petition, Gisentaner asserted claims for negligent, reckless and intentional conduct, including negligent and intentional invasion of privacy, negligent hiring, supervision/retention, premises liability,

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[4] Judge Gilmore's Denial of Petitioners' Motions to Dismiss America's complaint does not consider whether the Cornhill and OMI complaints were anticipatory. Cornhill filed this case before the *Gisentaner* suit became final, after unsuccessfully attempting to intervene and block entry of the judgment. (App. M., p. 55a). Petitioners also presented evidence that Cornhill and OMI conspired through R. L. Jarrett to file separate federal actions without the underlying EL policy before Gisentaner could file suit in state court, so that they could force petitioners into federal court, and force petitioners to simultaneously litigate two federal actions and a state action.

intentional infliction of emotional distress, negligent infliction of emotional distress, and tortious assault and battery.[5]

During the period of Gisentaner's employment, Valsamis, Inc. maintained both comprehensive general liability ("CGL") and EL coverage. Valsamis, Inc.'s policy period ended July 24th each year. Gisentaner's claims which arose from March 1992 through July 24, 1992, invoked the Americas CGL Policy and one Crum & Forster EL Policy in the state case. (R., V. 6, Tab 40, p. 772-811). Gisentaner's claims which arose after July 24, 1992, invoked the Cornhill CGL Policies, (R., V. 3, Tab 54, p. 1503-1561), the OMI Policy (R., V. 2, Tab 67, p. 1834-1876), and the other Crum & Forster EL Policy. Joinder of Crum & Forster defeats diversity. The OMI Policy is umbrella coverage over the Cornhill Policies, and the latter Crum & Forster EL Policy. The Cornhill Policies, OMI Policy, and latter Crum & Forster Policy were sold to Valsamis, Inc. by Technical Risks, Inc. ("Technical Risks"), a defendant in the *Gisentaner v. Americas* state case. (R., V. 3, Tab 54, p. 1454-1456). R. L. Jarrett Risk Services, Inc. ("R. L. Jarrett"), also a defendant in the state court case, was the broker on the Cornhill policies and the OMI Policy. (R., V. 3, Tab 54, p. 1317, 1312-1313). Joinder of either Technical Risks or R. L. Jarrett destroys diversity.

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[5] Gisentaner's original petition set forth facts in support of her claims for invasion of privacy which included physical and non-physical conduct engaged in by each defendant, unwanted sexual advances, unjustifiable invasion of her personal life, offensive inquiries concerning her private affairs, and the imposition of unreasonable and burdensome working conditions under false pretenses which were calculated to place Gisentaner alone with each of the defendants. Gisentaner's petition further alleged that Valsamis, Inc. was responsible for the supervision of each of its employees and owed Gisentaner independent duties of care. Identical allegations are contained in Gisentaner's first and second amended petitions.

The Valsamis Defendants' Notice to its Insurers

Immediately after being served with the *Gisentaner* suit, Valsamis, Inc., notified Technical Risks of the suit and requested an explanation of coverage under the policies. (R., V. 3, Tab 54, p. 1437-1438; R., V. I, pp. 79-80, R., V. 3, Tab 54, pp. 1276-1277, Exh. 19, pp. 1321, 1323). Technical Risks forwarded Valsamis' demand and Gisentaner's original petition to R. L. Jarrett, but R. L. Jarrett failed to forward the claim to the CGL underwriters. (R., V. 3, Tab 54, pp. 1275-1276, 1224-1225, 1230). None of Valsamis, Inc.'s insurers responded to Valsamis' demand for coverage and a defense, despite repeated inquires by Valsamis' lawyer. (Lord Aff., ¶ 5, R. Exc., Tab P). It was not until a year later, after Valsamis' counsel made numerous demands, both verbally and in writing, that any of Valsamis' insurers issued letters to Valsamis explaining their denial of coverage. (R., V. 3, Tab 54, p. 1273). During this time Valsamis, Inc. bore the burden of its own defense without any response from its insurers. Ultimately, a consent judgment was entered into "because Valsamis, Inc. could no longer afford to defend the lawsuit." (Lord Aff., R. Exc., Tab P). This is the basis for petitioners' causes of action for negligent claims handling and insurance code violations in *Gisentaner v. Americas*.

The Race to the Courthouse

Anticipating a suit by Gisentaner, Cornhill plotted with OMI, through R. L. Jarrett, to bring separate federal court declaratory judgment actions before Gisentaner could file a suit to enforce the judgment. (R., V. 3, Tab 54, pp. 1221, 1309, 1318). Americas also instituted a federal declaratory action. (R., V. 9, Tab 1, pp. 1-86).

Respondents won the race to the courthouse and filed separate suits which intentionally excluded R. L. Jarrett and Technical Risks. Yet, both Cornhill and OMI relied upon "lack of notice" as a defense to their duty to defend and indemnify Valsamis and disputed their "agency" for that purpose in the federal cases.

The *Gisentaner v. Americas* suit names all of the federal plaintiffs and Crum & Forster, R. L. Jarrett and Technical Risks as defendants. (R., V. 7, Tab 20, p. 317-318, 325). *Gisentaner vs. Americas* is a comprehensive proceeding. *Gisentaner v. Americas* asks the state court to determine coverage and duty to defend under all five policies and seeks damages for negligent claims handling settlement practices, conspiracy to deny coverage, and statutory violations of Texas law. The state court has jurisdiction over all parties whose interests might be affected by the Gisentaner judgment, and all claims between those parties. (App. L) (R., V. 7, Tab 20, p. 317-318, 325).

REASONS FOR GRANTING THE PETITION

POINT I: THE FIFTH CIRCUIT'S TREATMENT OF RULE 19(B) IS IN DIRECT CONFLICT WITH THE MANDATORY LANGUAGE OF THE RULE, AND THIS COURT'S DECISION INTERPRETING THE RULE IN *PROVIDENT TRADEMENS BANK & TRUST CO. V. LUMBERMENS MUTUAL CASUALTY COMPANY*. DESPITE THE FIFTH CIRCUIT'S CONCESSION THAT THE ABSENT PARTIES ARE NECESSARY PARTIES, NO COURT HAS DETERMINED WHETHER THOSE PARTIES ARE "INDISPENSABLE" UNDER THE FOUR FACTOR TEST REQUIRED BY FEDERAL RULE 19(B) AND THIS COURT'S DECISION IN *PROVIDENT TRADESMENS BANK & TRUST CO. V. LUMBERMENS MUTUAL CASUALTY COMPANY*, 390 U.S. 102 (1968). THE FEDERAL COURTS' REFUSAL TO APPLY THESE RULES HAS DEPRIVED PETITIONERS OF THEIR RIGHT TO HAVE THIS CONTROVERSY HEARD BEFORE A COURT OF COMPETENT JURISDICTION AND OBTAIN A RULING FROM TEXAS' HIGHEST COURT ON UNRESOLVED ISSUES OF TEXAS LAW.

The purpose of Fed. R. Civ. P. 19 is to protect the legitimate interests of absent parties and discourage duplicative litigation. *U.S. Ex Rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 908

(9th Cir. 1994); *Hammond v. Clayton*, 83 F.3d. 191, 195 (7th Cir.). Where a necessary party cannot be made a party, the court is required to determine "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed". Fed. R. Civ. P. 19(b). There are four interests that must be examined: (1) the plaintiff's interest in having a forum; (2) the defendants' proper desire to avoid multiple litigation or inconsistent relief; (3) the interest of the outsider; and (4) the interests of the courts and the public in complete, consistent, and efficient settlement of controversies. *Provident Tradesmen v. Lumbermens Mutual Casualty Co.*, 390 U.S. at 109-11, 88 S.Ct. at 737-39 (1968). The facts of this case require dismissal under this analysis. Furthermore, because the district court did not consider jurisdiction at all, and because the determination of whether the absent persons are indispensable requires conclusions of law, the Fifth Circuit was required to review the jurisdiction issue *de novo*. It did not. *Aguilar v. Los Angeles County*, 751 F.2d 1089, 1092 (9th Cir. 1985); *Janney Montgomery Scott, Inc. v. Shepherd Niles, Inc.*, 11 F.3d 399, 404 (3rd Cir. 1993).

A. Rule 19(b) First Factor — Prejudice To Petitioners Or Absent Parties

1. Prejudice to Petitioners - "The Defendants' Proper Desire to Avoid Multiple Litigation or Inconsistent Relief." *Provident*, 390 U.S. at 111.

The Cornhill, Crum & Forster, and OMI policies are part of a comprehensive "package" of insurance sold to Valsamis by Technical Risks. R. L. Jarrett brokered the Cornhill and OMI policies and admits withholding notice of the *Gisentaner* suit from Cornhill and OMI. Technical Risks withheld notice from Crum & Forster. The OMI policy is an umbrella over the Cornhill and Crum & Forster policies, but if there is no coverage under either, the OMI policy provides primary coverage, and assumes the duty to defend. Crum & Forster, Technical Risks, and R. L. Jarrett are non-joinable.

Petitioners asserted that Crum & Forster was indispensable because in order to determine whether OMI had a duty to defend, it is necessary to determine (1) whether there is coverage under the Cornhill policy; (2) whether there is coverage under the Crum & Forster policy, (3) whether there was a "potential" for coverage under either underlying policy; and (4) whether there was "potential" coverage under the OMI policy. All four issues need to be determined because under Texas law, the duty to defend is triggered by any potential for coverage and is broader than the duty to indemnify, *Gulf Chemical and Metallurgical v. Associated Metals*, 1 F.3d. 365, 369 (5th Cir. 1993); and the duty to defend is shared by concurrent and successive policies which have any potential coverage for any claim raised by the pleading. *American Physicians Insurance Exchange v. Garcia*, 874 S.W.2d 688 (Tex. 1994). Similarly, where there are several policies triggered by a continuing occurrence that crosses temporarily distinct policies, Texas law is undecided as to the rights of contribution and indemnity between the policies. *Id.* at 688, n. 20. If the federal court had considered jurisdiction before the merits, it would have been forced to acknowledge that petitioners' state causes of action required a determination of which policy(ies) were required to defend and which policy(ies) provided coverage. Thus petitioners were being forced to litigate identical issues in two courts. Once determined liability has to be apportioned under Chapter 33 of the Texas Civil Practice and Remedies Code.

Predictably, as soon as respondents were armed with Judge Hittner's summary judgment, they sought summary judgment in state court on *res judicata* grounds, depriving petitioners of a state forum to apply state law. (App. J). Technical Risks and R. J. Jarrett, also obtained summary judgment based upon the *res judicata* effect of Judge Hittner's judgment, claiming an agency relationship. (App. H-J). Yet, in this case, OMI and Cornhill disputed that "agency" to bolster their notice defenses. Furthermore, the *res judicata* ruling has unnecessarily complicated and protracted the litigation because the state courts of appeal must now determine which claims are barred by *res judicata*. Even if petitioners successfully appeal the

res judicata judgment, the only available remedy will be remand to litigate facts which will have become stale. The prejudice to petitioners from allowing the federal case to proceed should have been obvious.

The Fifth Circuit's backwards reasoning that Judge Hittner's judgment rests only on "contractual language" as justification for retaining jurisdiction under Rule 19(b) (App. A, p. 5a) and the degree to which it had to stretch Texas law to affirm the district courts' interpretation of the contracts, demonstrates the fundamental error of failing to decide jurisdiction FIRST. For example, OMI's potential for coverage as a primary, is never addressed, nor are the insurers' respective duties to defend considered separately from coverage. Rather, the court concludes no coverage, therefore, no duty to defend, an analysis in direct conflict with its own precedent in *Gulf Chemical Metallurgical, supra*. The Fifth Circuit also acknowledges four outcome determinative issues are unsettled under Texas law. In order to protect jurisdiction, the court decided Texas law by adopting a rule that defeats coverage, while acknowledging the Texas rule that a policy must be interpreted in favor of coverage. (App. A, p. 6). The critical issues are:

a. **Whether a cause of action for invasion of privacy required a "physical intrusion or unauthorized wiretapping." (App. A, p. 8).** The ruling is based solely on dicta from one court of appeals and ignores a Texas Supreme Court ruling affirming a judgment for invasion of privacy in a sexual harassment case. *Bushell v. Dean*, 803 S.W.2d 711 (Tex. 1991). Both the Americas and Cornhill policies provide coverage for intentional invasion of privacy under their personal injury coverage. Without ruling out this cause of action as a matter of law, the court would have been required to determine (1) Agency of Technical Risks and R. L. Jarrett; (2) lack of notice defense of Cornhill; (3) allocation of duty to defend where two successive policies have the "potential" for coverage; and (4) coverage under both policies.

b. **Whether Texas law recognizes a cause of action for negligent invasion of privacy. (App. A, p. 13a).** At least one Texas court has held that this is an open question. *Wheeler v. Yettie Kersting Memorial Hospital*, 886 S.W.2d 54 (Tex. App.--Houston 1993, no writ). Without deciding this issue, the court would have had to determine (1) the duty to defend under all five policies (because Crum & Forster's duty was necessary to determine OMI's duty) and (2) coverage under all five policies.

c. **Whether negligent hiring and supervision claims are interrelated to and interdependent on other intentional tort activities. (App. A, pp. 13-14a).** None of the Texas cases relied upon by the court involved CGL policies or sexual harassment claims. Texas law recognizes negligent supervision as an independent tort. In *Nagel Manufacturing & Supply Company v. Ulloa*, 812 S.W.2d 78 (Tex. App.--Austin 1991, writ denied), the Austin Court of Appeals upheld an employee's recovery of exemplary damages against an employer arising out of an assault by a co-employee in a sexual harassment case. In *K-Mart Corporation v. Martinez*, 761 S.W.2d 522 (Tex. App.--Corpus Christi 1988, writ denied), an employee recovered damages from her employer for a co-employee's reckless and malicious conduct involving assault and false imprisonment on a negligent supervision claim). In *Ewald v. Wornick Family Foods Corporation*, 878 S.W.2d 653 (Tex. App.--Corpus Christi 1994, writ denied), the court reversed a summary judgment in favor of an employer on the employee's claim for assault and battery arising out of her supervisor's sexual harassment of an employee). However, no Texas case has addressed the issue in the context of coverage under an insurance policy. This is

especially relevant to OMI's policy which covers "discrimination", assault between employees, and other intentional torts.[6]

d. **Whether sexual advances between adults can constitute "unintentional conduct" within the definition of "occurrence." (App. A, p. 16a).** The OMI policy conditions coverage for personal injuries which the policy defines to include "discrimination, humiliation, . . . or invasion of privacy" of an "occurrence." The case relied upon by the Fifth Circuit to "infer intent as a matter of law" is a case involving sexual molestation of a child. No Texas court has addressed the issue of intent under the definition of "occurrence" in a sexual harassment case, but two Texas courts have held intent to injure is not inferred in sexual relationships between adults. *Porter v. Nemir*, 900 S.W.2d 376, 381-82 (Tex. App.--Austin 1995), *State Farm v. S.S. & G.W.* 858 S.W.2d 374, 378 (Tex. 1993). Without the conclusion that intent to injure was inferred as a matter of law, the OMI policy coverage could not have been determined without a factual determination of intent to injure, thereby creating a "potential" for coverage and invoking OMI's duty to defend (assuming no coverage under both the Cornhill and Crum & Forster policies).[7]

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[6] The exclusion for assault and battery claims in the OMI policy does not apply to claims by employees. (Exh. A, Tab 5 to R. V. 2, Tab 67, p. 1877).

[7] Gisentaner was employed to assist in the ship repairing operations of Valsamis, Inc. Valsamis was the president and owner of Valsamis, Inc. Papapetrou was Gisentaner's supervisor. (Gisentaner Aff. R. Exc., Tab Q). Throughout the *Gisentaner* litigation, Valsamis and Papapetrou consistently denied any intent to harm Gisentaner. (R. Exc., Tab J. R., V. 3, Tab 54, p. 1485, 1471).

This uncertainty in the law required a finding of "potential" coverage, which then required a finding of the duty to defend. The federal court's determination of these novel questions of state law has deprived petitioners of the right to have the Texas Supreme Court resolve these uncertainties in state law.

2. Prejudice to the Absent Persons — "The Interest to the Outsider Whom It Would Have Been Desirable to Join." *Provident*, 390 U.S. at 111.

Crum & Forster, Technical Risks, and R. L. Jarrett have a legally protected interest in the outcome of the litigation. The determination of coverage under either the Cornhill or OMI Policies potentially subjects R. L. Jarrett and Technical Risks to liability for their failure to forward notice. A finding of coverage potentially gives rise to a right for contribution and indemnity to the EL carrier if there is overlapping coverage under that policy as well. *See American Physician's Insurance Exchange v. Garcia*, 874 S.W.2d 688 (Tex. 1994). Failure to join these persons subjects petitioners and the absent parties to inconsistent rulings and duplicitous litigation.

B. Rule 19(b) Second Factor — Prejudice Cannot be Lessened or Avoided

No fashioning of relief, or protective provisions in the judgment can redress petitioners' loss of the right to have the Texas Supreme Court determine unresolved issues of state law.

Failing to decline jurisdiction also subjected petitioners to excessive costs, unnecessarily protracted litigation, and has added more issues (*res judicata*) to an already complex case.

C. Rule 19(b) Third Factor - Any Judgment Rendered is Inadequate and Incomplete — "The Interest of the Courts and the Public in Complete, Consistent, and Efficient Settlement of Controversies." ***Provident, 390 U.S. at 111.***

In the absence of the additional defendants from the *Gisentaner v. Americas* suit, complete relief can not be afforded to the controversy. Additionally, petitioners' claims against OMI should not have been decided in the absence of the underlying Crum & Forster policy. The OMI Policy contained provisions which provided that that policy would drop down to primary coverage in the event of no underlying coverage. Without the underlying policy before it, it was impossible for the district court to determine whether or not the OMI policy was primary. The district court granted summary judgment declaring "no coverage" under the OMI Policy without regard to its potential to serve a "primary."[8]

The *Gisentaner v. Americas* suit alleges causes of action including conspiracy, fraud, breach of contract, breach of the duty of good faith and fair dealing, bad faith, deceptive trade practices and insurance code violations, which are not present in this case. Gisentaner could not have joined all of the necessary defendants to litigate these claims without destroying subject matter jurisdiction. Even if it is assumed *arguendo* that there was no coverage under any

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[8] The OMI policy provided coverage as follows:

> Underwriters hereon shall be only liable for the ultimate net loss the excess of <u>either</u>:
>
> (a) the limits of the underlying insurances . . . in respect of each occurrence covered by said underlying insurances,
>
> <u>OR</u>
>
> (b) $ ultimate net loss in respect of <u>each occurrence not covered by said underlying insurances</u> . . . . (R. II, Tab 67, p. 1877).

of the policies, there are issues concerning the damages caused by the insurers' failure to provide Valsamis, Inc. with a timely explanation of their denial of coverage and a defense. That failure violates statutory and common law duties outside the contracts. Thus, respondents were required to litigate these issues in state court. The federal court's exercise of jurisdiction did not result in judicial economy, or expeditious resolution to the controversy.

D. Rule 19(b) Fourth Factor — The Plaintiffs Had an Adequate Remedy in State Court — "The Plaintiff's Interest in Having a Forum." *Provident, 390 U.S. at 110.*

It is undisputed that the state court has jurisdiction over all parties to the federal proceeding and that the respondents have the same relief available to them in state court. Respondents never asserted that they would have been deprived of any rights or defenses in state court, nor can they. In fact, the discovery for the federal case had to be conducted in the state case to protect the rights of the absent parties.

POINT II: THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *WILTON V. SEVEN FALLS* AND *BRILLHART V. EXCESS INSURANCE COMPANY OF AMERICA.*

This Court has held that where a court of appeals accepts that a decision of this Court is controlling, but reaches a result that is contrary to the result required by that decision, certiorari will lie. *Egan v. City of Aurora,* 365 U.S. 514, 81 S.Ct. 684, 5 L.Ed.2d 741 (1961). Failure of a court of appeals to follow a decision of this Court establishes the need for this Court to exercise its supervisory power, justifying grant of certiorari. *Wilson v. Schnettler,* 365 U.S. 381, 81 S.Ct. 632, 5 L.Ed.2d 620 (1961) *reh. den.*, 365 U.S. 890, 81 S.Ct. 1025, 6 L.Ed. 200; *Wilkinson v. U.S.*, 365 U.S. 399, 81 S.Ct. 567, 5 L.Ed.2d 633 (1961); *reh. den.* 365 U.S. 890, 81 S.Ct. 1024, 6 L.Ed. 200; *Williams v. State of Georgia* 349 U.S. 375, 75

S.Ct. 814, 99 L.Ed. 1161 (1955). Additionally, since the controlling decisions of *Wilton* and *Brillhart* have been followed in several other courts of appeals, the subject of conflict with the decision of this Court will be combined with the discussion of conflict with other courts of appeals in Point III below.

POINT III: THE DECISION OF THE COURT OF APPEALS IS NOT ONLY IN CONFLICT WITH CONTROLLING DECISIONS OF THIS COURT, BUT ALSO CONFLICTS WITH THE DECISIONS OF ITS OWN CIRCUIT, AND OTHER COURTS OF APPEALS WHICH HAVE FOLLOWED THE DECISION OF THIS COURT.

The Fifth Circuit decision in this case, holds that declaratory judgment jurisdiction was properly based upon two factors: (1) a non existent factual finding that the federal suit was not anticipatory and (2) its conclusion that there were no indispensable parties under Rule 19(b). While the determination of whether necessary parties are indispensable is a relevant standard applicable to Rule 19, it is not the standard enunciated by this court in *Wilton* to govern declaratory judgment jurisdiction. (App. A, p. 5).

Both *Brillhart v. Excess Insurance Company of America* and *Wilton v. Seven Falls Co.* involved declaratory suits filed by insurers. In each case, the insurers won the race to the courthouse. In both cases, the Supreme Court held that exercise of federal jurisdiction had been properly declined and implied that the exercise of jurisdiction would have been an abuse of discretion. *Brillhart*, 316 U.S. at 1176-1177; *Wilton*, 115 S.Ct. at 2140-2141.

The facts in *Wilton* and *Brillhart* are nearly identical to those in the present case, and to those in *Granite State Insurance Company v. Tandy Corp.*, 986 F.2d 94 (5th Cir. 1993). In all three cases, the court declined jurisdiction. However, in the instant case, Judge Hittner exercised jurisdiction without explanation, in spite of strong evidence that all of the factors outlined by the Supreme Court dictate against exercise of jurisdiction in this case. *See Brillhart*, 316 U.S.

at 1176; *Rowan Companies v. Griffin*, 876 F.2d 26 (5th Cir. 1989). The Fifth Circuit's opinion is silent as to any of these factors.

Wilton reaffirmed Brillhart's language that:

> 'ordinarily it would be uneconomical, as well as vexatious, for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties.' . . . The question for a district court presented with a suit under the Declaratory Judgment Act, the court found, is 'whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, can better be settled in the proceeding pending in state court.'

Wilton, 115 S.Ct. at 2140, quoting from *Brillhart*, 316 U.S. at 494-495. Each of the factors outlined suggest that jurisdiction should have been declined in this case, yet, the panel concluded that the district court did not abuse its discretion with no explanation for its ruling. The factors the panel should have considered, and their application to this case are:

1. **There is another state court proceeding pending involving the same issues and parties.** Undisputed. *Gisentaner v. Americas* has been actively litigated. Appendix L outlines the parties, issues and causes of action which are asserted in each case. Every claim made in this case, was also before the state court.

2. **The case involves purely issues of state law.** Also undisputed. The insurance contracts at issue must be interpreted under Texas law.

3. The case involves novel questions of state law. (*See* Argument under Point I(A)(1), *supra*). Some are:

(a) The Texas Supreme Court has not decided the appropriate test to determine which of several policies are triggered and liable to a mutual insured when there is a continuing occurrence that is covered under successive policies. *American Physicians Insurance Exchange v. Garcia*, 874 S.W.2d 688, n. 20 (Tex. 1994).

(b) Texas law remains uncertain as to the existence and elements of a cause of action for negligent invasion of privacy.

(c) No Texas case has held that independent causes of action for negligent supervision and retention, and invasion of privacy, are "related to an interdependent on intentional acts of sexual harassment." The Fifth Circuit relied heavily on a district court opinion, *Old Republic Insurance v. Comprehensive Health Care*, 786 F.Supp. 629 (N. D. Tex. 1992), *aff'd on other grounds*, 2 F.3d 105 (5th Cir. 1993) for the proposition that sexual harassment cannot be an "occurrence" under Texas insurance law because other negligence causes of action that might be asserted are "related to an interdependent upon the intentional and wilful acts of sexual harassment." (App. A, pp. 13-14). Yet, the *Old Republic* opinion was not affirmed on the basis of the definition of occurrence, and no Texas case has addressed the issue.

(d) Whether the definition of "occurrence" excludes conduct that is intentionally engaged

> in or merely conduct that is intended to injure. The Fifth Circuit has twice interpreted Texas law to require intent to injure, as have several Texas Courts of Appeals and the Texas Supreme Court. (App. A., p. 16).

4. The state court had jurisdiction over everyone and all causes of action. Undisputed. All of the parties to this litigation have actively participated in the state court suit.

5. Anticipatory suit—Petitioners presented evidence that the Cornhill insurers attempted to intervene in the original *Gisentaner* suit and preclude entry of the *Gisentaner* judgment prior to filing this declaratory judgment action, evidencing their awareness and opposition to that judgment. Then, Cornhill filed its declaratory judgment before the *Gisentaner* judgment became final. Cornhill OMI & R. L. Jarrett conspired to file separate declaratory judgment actions without R L. Jarrett or Technical Risks as a party. Neither complaint complies with Rule 19(c). All of this evidence points to forum shopping. The only response offered by respondents was that their suits were filed first. There is no factual finding by the district court deciding this issue.

6. Avoiding piecemeal litigation—because the district court exercised jurisdiction in this case, petitioners were forced to litigate the same issues in state and federal court contemporaneously.

Brillhart, 316 U.S. at 494-495; *Wilton*, 115 S.Ct. at 2140-2141; *DiCisneros v. Younger*, 871 F.2d 305, 309 (2nd Cir. 1989); *Rowan Companies, Inc. v. Griffin*, 876 F.2d 26, 29 (5th Cir. 1989); *Aetna Casualty v. Kerr-McGee Chemical*, 875 F.2d 1261 (7th Cir. 1989); *TransAmerica Occidental Life Ins. v. DiGregorio*, 811 F.2d 1249, 1253-55 (9th Cir. 1987).

Despite these compelling reasons to decline exercise of jurisdiction and a total lack of any justification for the exercise of that jurisdiction, and despite the strong language in *Brillhart* and

Wilton, the Fifth Circuit affirmed jurisdiction without application of these factors. Petitioners respectfully suggest that if the panel opinion is not vacated, a rule will emerge that there can be no abuse of discretion if a district court accepts declaratory jurisdiction.

POINT IV: THE FIFTH CIRCUIT'S FAILURE TO CONDUCT A *DE NOVO* REVIEW OR REMAND CONSTITUTES FUNDAMENTAL VIOLATION OF ACCEPTED ORDERLY COURSE OF JUDICIAL PROCEEDINGS IN VIOLATION OF *BRILLHART* AND ITS OWN PRECEDENT.

Judge Hittner's failure to make findings constitutes an abuse of discretion as a matter of law because the lack of findings made it impossible for the Fifth Circuit to review his decision for an abuse of discretion. *Rowan Companies, Inc. v. Griffin*, 876 F.2d 26, 30 (5th Cir. 1989); *Bakia v. County of Los Angeles*, 687 F.2d 299 (9th Cir. 1982). Despite all of the reasons not to exercise jurisdiction in this case, Judge Hittner's acceptance of jurisdiction is left in a cloud of mystery by Judge Hittner's failure to rule on Petitioners' Motions to Dismiss. However, the answer may be as simple as timing. This Court granted certiorari in *Wilton* shortly after Judge Hittner took the motions under advisement. *Wilton v. Seven Falls*, 513 U.S. 1013 (1994). Judge Hittner may have misinterpreted the grant of certiorari as indicating that he had incorrectly decided *Wilton*. In the absence of findings, the Fifth Circuit had only two choices: (1) to find on *de novo* review that exercise of jurisdiction was an abuse of discretion as a matter of law under the *Brillhart* and *Wilton* standard, or (2) remand for findings that could be reviewed for an abuse of discretion.

CONCLUSION AND PRAYER

For these reasons, petitioners respectfully pray that this Court grant this Application for Writ of Certiorari and the petitioners be given further opportunity to brief and argue the issues raised herein.

Respectfully submitted,

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APPENDIX A

FILED
FEB 07 1996
U.S. COURT OF APPEALS
CHARLES R. FULBRUDGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-20898

CORNHILL INSURANCE PLC,
HANSA MARINE INSURANCE CO U K LTD;
ANGLO AMERICAN INSURANCE COMPANY, LIMITED;
UNDERWRITERS AT LLOYD'S LONDON,

Plaintiffs-Appellees,

versus

VALSAMIS, INC.;
CHERYL GISENTANER,

Defendants-Appellants.

AMERICAS INSURANCE COMPANY

Plaintiff-Appellee

versus

VALSAMIS, INC.;
CHERYL GISENTANER,

Defendants-Appellants

OCEAN MARINE INDEMNITY CO.,

Plaintiff-Appellee

versus

VALSAMIS, INC:
CHERYL GISENTANER,

Defendants-Appellants

Appeal from the United States District Court
For the Southern District of Texas

Before KING and HIGGINBOTHAM, Circuit Judges, and LAKE*, District Judge.

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*District Judge of the Southern District of Texas, sitting by designation.

HIGGINBOTHAM, Circuit Judge:

This suit is the consolidation of three actions filed by insurers and underwriters seeking a declaration that insurance policies[1] issued to Valsamis, Inc. do not cover incidences of sexual harassment. The district court granted summary judgment for the insurers and Cheryl Gisentaner, assignee of Valsamis, Inc.'s claims and defendant in the action below, appeals. We find that the claims of sexual harassment do not raise a potential for coverage under the policies, and affirm the decision of the district court.

I.

On October 29, 1992, Cheryl Gisentaner filed a lawsuit in Texas state court against her former employer, Valsamis Inc., her supervisor at Valsamis, Christos Papapetrou, and the president of Valsamis Inc., Dimitrios Valsamis. Gisentaner alleged that from approximately March 1992 until her resignation on September 2, 1992, Papapetrou made sexual remarks to her, touched her in an inappropriate and offensive manner, exposed himself, made threatening and obscene gestures, and eventually attempted to force himself on her in a supply room When she reported this behavior to Valsamis in June of 1992, he failed to address Papapetrou's conduct, tried to kiss her, asked her out repeatedly, and arranged to meet her alone under pretenses of work. In her initial complaint, Gisentaner sought damages for intentional and negligent infliction of emotional distress, tortious assault and battery, intentional and negligent invasion of privacy, and negligent hiring and supervision. Denial of coverage premised on the allegations in this complaint was sent to Valsamis on September 8, 199 3. Subsequently, Gisentaner filed a first amended complaint, adding a claim for failure to maintain a safe work environment. Coverage premised on this amended complaint was denied on January 27, 1994.

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1. The policies in question are a comprehensive general liability policy issued by Americas Insurance Company, three policies issued by Cornhill Insurance PLC providing comprehensive general liability and excess comprehensive general liability coverage, and an umbrella policy issued by Ocean Marine Indemnity Co. Appellants, plaintiffs in the action below, will be referred to as "insurers."

The defendants in the state court sexual harassments suit settled with Gisentaner for an agreed judgment of $1,250,000, an assignment of Valsamis, Inc.'s claims against its insurers, $110,000 paid by Valsamis, Inc. to Gisentaner in consideration for the assignment, and a covenant by Gisentaner not to execute on the judgment against Valsamis. One month after the settlement, Gisentaner filed a second amended complaint which deleted all intentional tort claims.

The insurers then brought to present action, seeking a judgment declaring that they had no duty to defend against Gisentaner's state court claims and that their policies do not provide coverage for the claims and that their policies do not provide coverage for the claims settled by Valsamis and Gisentaner. Subsequently, Gisentaner filed suit against the insurers in state court as a judgment creditor of Valsamis and as an assignee of Valsamis' cause of action for bad faith, insurance code violations and deceptive trade practices. Defendants in Gisentaner's state court suit included all of the plaintiffs in this declaratory judgment action and the issuers of two employer liability policies as well as the agent and broker for all of the policies.

Gisentaner attempted to dismiss this declaratory judgment action, claiming that the extra parties in the state court suit were indispensable to the federal suit and that their mandatory joinder would defeat diversity. The district court judge withheld ruling on this motion until September 26, 1995, when he denied it and also granted summary judgment in favor of the insurers.

II.

Gisentaner claims that the district court should not have exercised jurisdiction in this case because it failed to join indispensable nondiverse parties and abused its discretion in not staying the federal suit in favor of the state court suit.

A.

Fed R. Civ. P. 19 allows joinder of necessary parties unless that joinder would defeat diversity jurisdiction. If jurisdiction is threatened,

the court must determine whether the potentially joined parties are indispensable, that is, if the court finds that, as a matter of equity and good conscience, the lawsuit cannot proceed without them. *Sandefer Oil & Gas, Inc. v. Duhon*, 871 F.2d 526, 529 (5th Cir. 1989). The threat of multiple litigation will not make a party indispensable but the threat of inconsistent obligations will. *Shelton v. Exxon Corp.*, 843 F.2d 212, 218 (5th Cir. 1988). Fed. R. Civ. P. 19(b) lists four factors for courts to consider in deciding whether a party is indispensable: 1) prejudice to an absent party or others in the lawsuit from a judgment; 2) whether the shaping of relief can lessen prejudice to absent parties; 3) whether adequate relief can be given without participation of the party; and 4) whether the plaintiff has another effective forum if the suit is dismissed.

Gisentaner claims that the agent and broker for the policies in this case are indispensable parties because Cornhill and OMI asserted lack of notice as a defense to coverage. Gisentaner also claims that because OMI is an umbrella policy, the issuer of its underlying employer liability policy is an indispensable party. None of the factors listed in Fed. R. Civ. P. 19(b) cut in favor of joining the parties Gisentaner identified as indispensable. The district court's decision rested solely on contractual language in the policies and those parties with an interest in the interpretation of that language were present in this action.

B.

Gisentaner also claims that the district court abused its discretion in refusing to dismiss this suit. A district court has broad discretion to retain or dismiss a declaratory judgment suit where a parallel state court suit has been filed. *Brillhart v. Excess Ins.*, 316 U.S. 491 (1942). The breadth of this discretion was recently reaffirmed by the Supreme Court in *Wilton v. Seven Falls, Co.*, 115 S. Ct. 2137, 2144 (1995). The district court in this case found that the insurers' suits were not anticipatorily filed, and that no indispensable parties were excluded. We do not find this action to be an abuse of discretion.

III.

Under Texas law, an insurer's duty to defend is triggered where the allegations in the plaintiff's pleadings raise a potential for coverage under the policy. *Argonaut Southwest Ins. Co. v. Maupin*, 500 S.W.2d 633, 635 (Tex. 1973). An insurer bears the burden of proving that the allegations contained in the underlying plaintiff's petition are excluded from coverage and any doubt is resolved in favor of the insured. *Adamo v. State Farm Lloyds Co.*, 853 S.W.2d 673 (Tex. App.-Houston 1993, writ denied), *cert. denied*, 114 Ct. (1994). This burden includes proving that none of the claims asserted potentially fall within coverage. *Heyden Newport Chem. Corp. v. Southern Gen. Ins. Co.*, 387 S.W.2d 22, 26 (Tex. 1965). The duty to defend is determined by examining the latest amended pleading upon which the insurer based its refusal to defend the action. *Rhodes v. Chicago Insurance Co.*, 719 F.2d 116, 120 (5th Cir. 1983).

A. Americas Policy

The comprehensive general liability policy issued to Valsamis by Americas covered bodily and personal injury. For bodily injury, the policy restricted coverage to damages caused by an "occurrence," but there was no occurrence requirement for claims of personal injury. The definition of personal injury included injury arising out of "false arrest, detention, imprisonment or malicious prosecution," or "a publication of utterance . . . in violation of an individual's privacy."

Gisentaner seeks coverage for her claims in the definition of "personal injury" in the Americas policy.[2] In her original petition in state court, Valsamis alleged invasion of privacy, which is specifically referenced as a personal injury within Americas policy. She also now alleges that the facts in her complaint state a claim for false detention, also covered in the definition of personal injury.

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2. Gisentaner does not argue that Americas' bodily injury provision covers her claims.

Texas courts do not look to conclusory assertions of a cause of action in determining a duty to defend. Instead, they look to see if the facts giving rise to the alleged actionable conduct, as stated within the eight corners of the complaint, constitute a claim potentially within the insurance coverage. *Adamo v. State Farm Lloyds Co.*, 853 S.W.2d 673 (Tex. App.-Houston 1993, writ denied). We will therefore look to see if Gisentaner alleged facts that constitute a claim for invasion of privacy or false imprisonment under Texas law to determine whether Americas had a duty to defend.

1. Invasion of Privacy

The Texas Supreme Court first recognized the tort of invasion of privacy in *Billings v. Atkinson*, 489 S.W.2d 858, 859 (Tex. 1973). Texas law now recognizes three distinct torts, any of which constitutes an invasion of privacy.[3] *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 682 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Gisentaner did not allege that Valsamis publicly disclosed embarrassing private facts about her or appropriated her name or likeness. Gisentaner's allegations come closest to fitting the cause of action for invasion of privacy where there has been "intrusion upon the plaintiff's seclusion or solitude, or into his private affairs." *Texas Indus. Accident Bd.*, 540 S.W.2d at 682. However, no Texas court has considered whether sexual harassment is cognizable under this definition, therefore we must assess whether Texas courts could find that Gisentaner stated a claim for invasion of the right to privacy.

To state a cause of action under this theory of invasion of the right to privacy, Texas case law requires proof that there was an intentional intrusion upon the solitude of seclusion of another or his private affairs or concerns that is highly offensive to a reasonable person. *Farrington v. Sysco Food Serv., Inc.*, 865 S.W. 2d 247, 251 (Ct. App.-

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3. *Texas Indus. Accident Bd.* actually established four types of invasion of privacy but the Texas supreme court has since abolished the fourth, false light invasion of privacy. *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994)

Houston 1993); *Gill v. Snow,* 644 S.W.2d 222, 224 (Ct. App. Ft. Worth 1982). However, at least one Texas court has noted that this type of invasion of privacy "is generally associated with either a physical invasion of a person's property or eavesdropping on another's conversation with the aid of wiretaps, microphones or spying." *Wilhite v. H.E. Butt Co.,* 812 S.W.2d 1, 6 (Tex. App.-Corpus Christi 1991). Gisentaner made no such allegation in her complaint. In contrast, she alleged that Valsamis and Papapetrou made offensive comments and inappropriate advances toward here. These facts would not be cognizable as a cause of action for invasion of privacy under Texas law.

2. False Imprisonment

Americas' policy defines personal injury to include claims of false imprisonment. Gisentaner claims that the incident where Papapetrou tried to force himself on her in a closet at work states a cause of action for false imprisonment under Texas law. Texas law defines false imprisonment as willful detention without consent and without authority of law. *Sears, Roebuck & Co. v. Castillo,* 692 S.W.2d 374, 375 (Tex. 1985). However, Gisentaner alleged that Papapetrou attempted to force himself on her in an unlocked supply room accessible to other employees. She did not allege that he kept her there by physical force or by threatening her. She did not allege detention and therefore her allegations are insufficient to state a claim for false imprisonment under Texas law. *See Randall's Food Markets, Inc. v. Johnson.* 891 S.W.2d 640 (Tex. 1995).

B. Cornhill Policies

Unlike Americas, Cornhill's comprehensive general liability policy included an employment exclusion that applied to both bodily and personal injury. However, Cornhill's policy also contained a personal injury endorsement that extended coverage to include liability for personal injury arising from Valsamis' shiprepairing operations.

The employment-related claim exclusion in Cornhill's policy precluded coverage for:

> Any liability of whatsoever nature of the Assured, whether the Assured may be liable as an employer or in any other capacity whatsoever, to any of its Employees, including without limiting the generality of the foregoing any liability under any workers' compensation law, unemployment compensation law, disability benefit law, United States Longshoremen's and Harbor Workers' Compensation Act, Jones Act, Death on the High Seas Act, General Maritime Law, Federal Employer's Liability Act, or any similar laws or liabilities, and/or whether by reason of the relationship of master and servant or employer and employee or not . . . [and] [a]ny liability of any Employee of the Assured with respect to bodily and/or personal injury to or illness or death of another Employee of the Assured sustained in the course of such employment.

The wording of this employment exclusion is very broad. Gisentaner's state court action complained of negligent acts by Valsamis, Inc. as her employer. Negligent hiring and supervision necessarily involve the employment relationship and therefore this exclusion precludes coverage. The injuries inflicted by Valsamis and Papapetrou all occurred while Gisentaner was employed by Valsamis and were sustained in the course of her employment and are therefore also excluded. Our interpretation of this employment exclusion is supported by Texas law. In *Aberdeen Ins. Co. v. Bovee*, 777 S.W.2d 442 (Tx. app.-El Paso 1989), the court considered a similar employment exclusion and found that it was broad enough to encompass sexual harassment and negligent hiring and supervision claims. *Bovee*, 777 S.W.2d at 444.

Gisentaner argues that the language in Cornhill's policy is similar to that in *Western Heritage Insurance Company v. Magic Learning Centers and Child Care, Inc.*, 45 F.3d 85, 88-89 (5th Cir. 1995), and

that this employment-related claim exclusion only excludes claims against Valsamis, Inc. because it is the only employer. However, the policy language in *Magic Years* did not contain the language found in Cornhill's policy excluding coverage for liability of one employee to another. Therefore, the holding in *Magic Years* that the employment exclusion only applied to claims against the employer and not to claims against the president and secretary of the organization does not control our decision here.

Gisentaner also argues that because her secretarial duties included accounting and scheduling for shiprepairing operations, she should benefit from the shiprepairing endorsement. The endorsement covers:

legal liability of the Assured for death or personal injury occurring in the course of and arising from the shiprepairing operations of the Assured but in no event . . . for any claim arising directly or indirectly under . . . Common Law Liability in respect of loss of life, bodily injury to, or illness of any workman or other person employed in any capacity whatsoever by the Assured, his agents or sub-contractors when such loss of life, bodily injury to, or illness arises out of or in the course of the employment of such workman or other person.

Gisentaner's argument, however, ignores the requirement that the personal injury must arise from the shiprepairing operations. Gisentaner's injuries arose from sexual harassment, not the administrative support work she did for the shiprepairing operations.

C. OMI Policy

OMI provided a umbrella excess liability policy that covered damages on account of personal injuries caused by or arising out of an occurrence. The personal injury definition included invasion of privacy, false detention, and discrimination. OMI's policy also originally contained an employee exclusion but this was eliminated when Valsamis purchased employee buy-back coverage.

Because OMI's policy does not contain an employment exclusion, we must determine whether Gisentaner's claims fall within the definition of personal injury in OMI's policy. Under OMI's policy defines personal injury coverage requires an accurrence. OMI's policy defines an occurrence as "an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability."

Gisentaner claims that we are bound to accept the characterization of Valsamis' acts as negligent because judgment was entered on this basis in the state court as a result of the settlement between herself and Valsamis. However, in *Columbia Mutual Ins. Co. v. Fiesta Mart,* 987 F.2d 1124 (5th Cir. 1993), a panel of this court declined to bind an insurer to findings in a state court suit where coverage was not at issue. *Fiesta Mart,* 987 F.2d at 1127. Therefore, we must characterize the facts alleged in Gisentaner's complaint to determine whether they fall within the language of OMI's policy.

Gisentaner also insists that we look at each individual cause of action she listed in her complaint to determine whether she alleged an "occurrence." In her original complaint, Gisentaner alleged negligent infliction of emotional distress, negligent invasion of privacy, and negligent hiring and supervision. In 1993, the Texas Supreme Court eliminated negligent infliction of emotional distress as a cause of action. *Boyes v. Kerr,* 855 S.W.2d 593, 593 (Tex. 1993). Texas law also requires proof of intent for an invasion of privacy cause of action. *See Billings v. Atkinson,* 489 S.W.2d 858, 859 (Tex. 1973); *Childers v. A.S.,* 909 S.W.2d 282, 291 (Ct. App.-Ft. Worth 1995); *but see Wheeler v. Yettie Kersting Memorial Hospital,* 866 S.W.2d 32, 54 (Tex. App.-Houston 1993, no writ) (finding that the question of whether Texas law recognizes a claim of negligent invasion of privacy is still an open question). Therefore, the only negligence claims available under Texas law are for negligent supervision and hiring of Papapetrou.

This circuit has held that where liability premised on negligence is related to an interdependent of other tortious activities, the

"ultimate issue" is whether the tortious activities themselves are encompassed by the "occurrence" definition. *New York Life Ins. v. Traveler's Ins. Co.*, 92 F.3d 336 (5th Cir. 1996); *Fiesta Mart, Inc.*, 987 F.2d at 1128 (citing *Thornhill v. Houston Gen. Lloyds*, 802 S.W.2d 127, 130 (Tex. App.-Fort Worth 1991-no writ); *Centennial Ins. Co. v. Hartford Accident and Indemnity Co.*, 821 S.W.2d 192, 1994 (Tex. App-Houston 1991, no writ); *Fidelity and Guaranty Ins. Underwriters, Inc. v. McManus*, 633 S.W.2d 787, 790 (Tex. 1982). Gisentaner's negligent hiring and supervision claims require proof of misconduct by Papapetrou. *See Canutillo Independent School District v. National Union Fire Ins. Co.*, 99 F.3d 695, 705 (5th Cir. 1996) (finding that negligent supervision claim would not exist without damage caused by sexual abuse). Therefore, our only inquiry is whether Papapetrou and Valsamis' acts are covered under the definition of "occurrence."

The district court cited *Old Republic Ins. v. Comprehensive Health Care*, 786 F.Supp. 629 (N.D. Tex. 1992), *affd. on other gds.*, 2 F.2d (5th Cir. 1993), for the proposition that intentional torts, such as sexual harassment, cannot be occurrences under Texas law *Old Republic* held that intentional or willful acts are not "occurrences" as that term is defined in insurance policies. The specific language in *Old Republic* mirrored that of OMI's policy here, stating that occurrences result in personal injuries neither expected nor intended from the standpoint of the insured. *Old Republic*, 786 F.Supp. at 633. The court in *Old Republic* noted that Texas courts had consistently excluded intentional torts from the definition of "occurrence" and found that the insured had not produced Texas precedent to call these decisions into question.

In one of the cases cited by *Old Republic*, *Argonaut Southwest Insurance Company v. Maupin*, 500 S.W.2d 633, 636 (Tex. 1973), the Texas Supreme Court considered whether an intentional tort could be considered an occurrence under a comprehensive general liability policy. The policy in *Maupin* defined an occurrence as "either (a) an accident or (b) in the absence of an accident, a condition for which the insured is responsible which during the policy period caused physical injury to or destruction of the property which was not intended."

Maupin, 500 S.W.2d at 634 n.1. The insured in *Maupin* purchased dirt from a man who occupied a parcel of land, mistakenly thinking that he owned the land. The insured then went onto the land and removed the dirt. The actual owners then sued the insured for trespass. The court found that the resulting injury to the owners was not caused by an occurrence because the insured acted intentionally when he took the soil off the property, even though the resulting injury was unforeseen or unintended. *Maupin* has been interpreted by Texas courts to exclude intentional acts from the definition of occurrence without regard to whether the harm was expected or intended by the actor. *See, e.g., Pierce v. Benefit Trust Life Insurance Co.*, 784 S.W.2d 516, 518 (Ct. App.-Amarillo 1990) (finding that the insured's hernia was not caused by an occurrence because, although it was unexpected and unintended, it resulted from the insured's intentionally lifting a bag); *Baldwin v. Aetna Casualty & Surety Co.*, 750 S.W.2d 919, 920 (Tex. App.-Amarillo 1988, error denied) (finding that the definition of occurrence excluded a trucking company's claims for damage caused by their deliberately putting overweight trucks on the road); *Southern Farm Bureau Casualty Ins. Co. v. Brock*, 659 S.W.2d 165 (Ct. App.-Amarillo 1983) (finding that damage to a truck that was rammed into a car in order to prevent the occupant of the car from shooting someone was not caused by an occurrence because the truck driver meant to drive into the car).

Gisentaner claims, however, that the Texas supreme court's decision in *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374 (Tex. 1993) modifies the rule in *Maupin* to require specific intent to commit the harm for a claim to fall outside the definition of occurrence. She reasons that an intentional act with unintended consequences can still give rise to liability unexpected or unintended from the standpoint of the insured.

In *State Farm*, the supreme court considered whether an intentional injury exclusion precluded recovery for a woman who contracted herpes from her boyfriend. The court held that the transmission of herpes was not an intentional act, despite the intentional nature of the intercourse, because the boyfriend was asymptomatic and therefore the transmission was not a "natural result" of his intentional act. The

court explained that *Maupin* stood for the proposition that damage is not accidental where the acts are voluntary and intentional and the injury was the natural result of the act, "even though the injury may have been unexpected, unforeseen and unintended." *State Farm*, 858 S.W.2d at 377 n.2.

Even if Texas law requires specific, instead of general, intent, we find that the harm in this case was not caused by an occurrence. *State Farm* does not preclude a finding that intent to cause injury can be inferred as a matter of law. The Texas supreme court noted that the question of intent is highly fact specific and that an actor intends to injure if he believes that the consequences of his acts are substantially certain to follow. *State Farm*, 858 S.W.2d at 379. In the present case, Gisentaner's first amended complaint alleged that Papapetrou and Valsamis' conduct was "extreme and outrageous, undertaken for the purpose of causing . . . severe emotional distress," and was "calculated to and did produce . . . severe emotional distress." Her injuries were the natural result of Valsamis' actions and were substantially certain to follow.

IV.

Gisentaner also alleges that the district court erred in failing to require the insurers involved in this case to post a bond with the court, as required by Tex. Ins. Code Ann. art. 1.36, § 11 (Vernon's Supp. 1991). However, under that provision, a court has discretion to dispense with the deposit of a bond. We find that the district court acted within its discretion by releasing Americas, Cornhill, and OMI from the bond requirement.

CONCLUSION

Because we find that Gisentaner's claims did not raise a potential for coverage under the policies issued by Americas, Cornhill, and OMI, we AFFIRM the decision of the district court.

APPENDIX B

FILED
MAR 10 1997
U.S. COURT OF APPEALS
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-20898

CORNHILL INSURANCE PLC,; HANSA MARINE INSURANCE CO U K LTD; ANGLO AMERICAN INSURANCE COMPANY, LIMITED; UNDERWRITERS AT LLOYD'S LONDON,

Plaintiffs-Appellees,

v.

VALSAMIS, INC.; CHERYL GISENTANER,

Defendants-Appellants.

AMERICAS INSURANCE COMPANY

Plaintiff-Appellee

v.

VALSAMIS, INC.; CHERYL GISENTANER,

Defendants-Appellants

OCEAN MARINE INDEMNITY CO.,

Plaintiff-Appellee

v.

VALSAMIS, INC: CHERYL GISENTANER,

Defendants-Appellants

Appeal from the United States District Court for the
Southern District of Texas, Houston

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 2/7/97, 5 Cir., _____, _____ F.3d_____)

Before KING and HIGGINBOTHAM, Circuit Judges, and LAKE*, District Judge.
PER CURIUM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/illegible
United States Circuit Judge

CLERK'S NOTE: SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

*District Judge of the Souther District of Texas, sitting by designation.

APPENDIX C

ENTERED
SEPT 28 1995
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MICHAEL N. MILBY, CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CORNHILL INSURANCE PLC.,		§ CIVIL ACTION
ET AL.,		§ NO. 94-1013
	Plaintiffs	§ H-94-1013
v.		§
VALSAMIS, INC.		§
	Defendant	§

AMERICAS INSURANCE CO.,		§ CIVIL ACTION
	Plaintiff	§ NO. 94-1336
v.		§ CONSOLIDATED
VALSAMIS, INC.; AND		§ INTO
CHERYL GISENTANER,		§ CIVIL ACTION
	Defendants	§ 94-1013

OCEAN MARINE INDEMNITY CO.,		§ CIVIL ACTION
	Plaintiff	§ NO. 94-1977
v.		§ CONSOLIDATED
VALSAMIS, INC: AND		§ INTO
CHERYL GISENTANER,		§ CIVIL ACTION
	Defendants	§ 94-1013

ORDER

As the plaintiffs' motions for summary judgment (Documents #33, 46, 49, 60) have been granted, the Court

GRANTS summary judgment in favor of the plaintiffs pursuant to Fed. R. Civ. P. 56(c).

This is a FINAL JUDGMENT.

SIGNED at Houston, Texas, on this the 26 day of September, 1995.

/s/David Hittner
DAVID HITTNER
United States District Judge

APPENDIX D

ENTERED
SEPT 28 1995
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MICHAEL N. MILBY, CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CORNHILL INSURANCE PLC.,		§ CIVIL ACTION
ET AL.,		§ NO. 94-1013
	Plaintiffs	§ H-94-1013
v.		§
VALSAMIS, INC.		§
	Defendant	§

AMERICAS INSURANCE CO.,		§ CIVIL ACTION
	Plaintiff	§ NO. 94-1336
v.		§ CONSOLIDATED
VALSAMIS, INC.; AND		§ INTO
CHERYL GISENTANER,		§ CIVIL ACTION
	Defendants	§ 94-1013

OCEAN MARINE INDEMNITY CO.,		§ CIVIL ACTION
	Plaintiff	§ NO. 94-1977
v.		§ CONSOLIDATED
VALSAMIS, INC: AND		§ INTO
CHERYL GISENTANER,		§ CIVIL ACTION
	Defendants	§ 94-1013

ORDER

Pending before the Court are the Motion for Summary Judgment (Document #33) filed by plaintiff Americas Insurance Company ("Americas"), the cross Motions for Summary Judgment (Documents #40, 54, 67) and the Motion to Dismiss (Document #66) filed by defendants Valsamis, Inc. and Cheryl Gisentaner, the Motions for Summary Judgment (Documents #46, 49) filed by plaintiffs Cornhill Insurance, Underwriters at Lloyds, and Certain other Interested Underwriters ("Cornhill")[1], and the Motion for Summary Judgment (Document #60) filed by plaintiff Ocean Marine Indemnity Company ("OMI). Having considered the motions, submissions, and applicable law, the Court determines that the motions for summary judgment filed by Cornhill should be granted, the motion for summary judgment by Americas should be granted, the motion for summary judgment filed by OMI should be granted, and the cross motions for summary judgment and motion to dismiss filed by defendants Valsamis, Inc. and Cheryl Gisentaner should be denied.

Plaintiff insurance companies filed the instant action for declaratory judgment seeking construction of various insurance policies and seeking a declaration and judgment that they do not have a duty to defend or indemnify defendant Valsamis, Inc. against judgment in a suit brought by defendant Cheryl Gisentaner.

Cheryl Gisentaner filed suit against her former employer, Valsamis, Inc., in the 125th District Court of Harris County, Texas in cause No. 92-49457 styled *Cheryl Gisentaner v. Dimitrios Valsamis, Christos Papapetrou, and Valsamis, Inc.* ("the underlying suit"). In the underlying suit, Gisentaner alleged that Christos Papapetrou, an employee of Valsamis, Inc., and Dimitrios Valsamis, the president and

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1. The Cornhill plaintiffs represent the collective underwriters on a comprehensive general liability policy and two excess comprehensive general liability policies which provided insurance to defendant Valsamis, Inc. The Cornhill plaintiffs, Underwriters at Lloyds, and Certain other Interested Underwriters, will hereinafter be referred to as "Cornhill."

owner of Valsamis, Inc., sexually harassed her beginning in March 1991 through September 1992. Gisentaner resigned on September 2, 1992.

Americas, Cornhill, and OMI issued various insurance policies to Valsamis Inc. The policies issued by Americas and Cornhill are comprehensive general liability insurance policies and the OMI policy is an umbrella policy providing excess coverage. Valsamis, Inc. demanded that the insurance companies provide a defense in the underlying suit or indemnify it or both. The insurance companies refused coverage, asserting the policies did not protect Valsamis from the claims asserted by Gisentaner. Valsamis, Inc. and Gisentaner subsequently settled the state court suit for $1,250,000, an assignment of Valsamis, Inc.'s claims against its insurers, and a covenant by Gisentaner not to execute on the judgment against Valsamis.

After the settlement and assignment, Gisentaner amended her state court pleadings to include claims of negligent infliction of emotional distress, negligent failure to maintain a reasonably safe work environment, intentional and negligent invasion of privacy, negligent hiring and supervision, premises liability, and willful, reckless, and/or gross negligence. At the same time, Gisentaner deleted from her pleadings all causes of action for sexual harassment and assault and battery.

Gisentaner then filed suit against the plaintiff insurance companies in state court, individually, as a judgment creditor of Valsamis, Inc., and as an assignee of Valsamis, Inc.'s causes of action for bad faith, insurance code violations, and deceptive trade practices. The insurers now seek a judgment declaring that the various policies do not provide coverage for the negligence claims raised by Gisentaner's amended pleadings in the underlying suit.

Summary judgment in this action is appropriate if the record reflects that "there is not genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also, Commercial Union Ins. Co. v. Roberts,* 7 F.3d 86, 88 (5th Cir. 1993). Furthermore, pursuant to Texas law, the burden is gen-

erally on an insured to show that a loss is within the scope of an insurance policy's coverage to recover under that policy. *Sentry Insurance Co. v. R.J. Weber, Co., Inc.*, 2 F.3d 554, 556 (5th Cir. 1993) (*citing Employers Casualty Co. v. Block*, 744 S.W.2d 940, 945 (Tex. 1988). An insurer, however, bears the burden of establishing that a policy's exclusion constitutes an avoidance or affirmative defense to coverage. *Id.*; Tex. Ins. Code Ann. art 21.58(b) (Supp. 1995).

Americas and Cornhill, in their summary judgment motions, argue that they do not owe a duty to indemnify or defend Valsamis, Inc. against the claims brought by Gisentaner in the underlying state action pursuant to the insurance policies at issue. Specifically, the Americas and Cornhill policies state that the insurers will pay for damages the insured (Valsamis, Inc.) is required to pay as a result of bodily injury. *See* Document #33, exhibit A; Document #46, exhibit A.[2] However, the policies also provide that for the bodily injury coverage to apply, the injury must have been caused by an "occurrence." *Id.*[3] Furthermore, in the sections entitled "Exclusions, " the policies expressly state that coverage does not apply "to bodily injury to an employee of the insured arising out of and in the course of the employment of the insured . . ." *Id.* The Americas and Cornhill policies also provide additional coverage for personal injury. Specifically, the policies contain a "Broad Form Comprehensive General Liability Endorsement" which states that the insurers will pay for damages incurred by the insured because of personal injury. *Id.*[4]

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2. *See* Coverage A- Bodily Injury Liability - The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

A. bodily injury.

3. "Occurrence" is defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

4. *See* Personal Injury and Advertising Injury Liability Coverage - The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of personal injury or advertising injury to which this insurance applies . . .

Neither Americas nor Cornhill owes a duty to defend or indemnify against Gisentaner's claim for intentional invasion of privacy. The Americas and Cornhill policies limit coverage for "bodily injury" to those injuries resulting from an "occurrence." Intentional acts are excluded from coverage under the bodily injury provisions since pursuant to the policies, intentional acts are not occurrences. *See Old Republic Insurance Co. v. Comprehensive Health Care Associates. Inc.*, 786 Supp. 629 (N.D.Tex. 1992), *aff'd on other grounds*, 2 F.3d 105 (5th. Cir. 1993). Therefore, the policies do not cover Gisentaner's claim for invasion of privacy.[5]

In her second amended petition, Gisentaner stated a claim for negligent infliction of emotional distress. Since Texas does not recognize a cause of action for negligent infliction of emotional distress. *See Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993). Not only are intentional acts excluded from coverage, but the bodily injury provisions cover only bodily injuries, not emotional distress. *Travelers Indem. Co. v. Holloway*, 17 F.3d 113, 115 (5th Cir. 1994). Therefore, Gisentaner's claim for intentional infliction of emotional distress is excluded from coverage under the bodily injury provisions of the Cornhill and Americas policies.

With the exception of her claim for intentional invasion of privacy, Gisentaner alleged causes of action grounded in negligence rather than intentional conduct. However, as a matter law Americas and Cornhill have no duty to defend or indemnify against Gisentaner's allegations of negligent hiring and supervision, negligent failure to maintain a reasonably safe work environment, negligent invasion of privacy, premises liability, and willful, reckless, and/or gross negligence.

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5. The Americas and Cornhill policies also contain employee exclusions which provide that the policies do not apply to "bodily injury to any employee of the insured arising out of and in the course of his employment by the insured." *See* Document #33, exhibit A; Document #46, exhibit A. Since Gisentaner's injuries arose out of her employment with Valsamis, Inc., the employment exclusions provide an additional basis for the Court's finding that her injuries are not within the scope of the Americas and Cornhill bodily injury provisions.

Gisentaner's claim is essentially that Valsamis, Inc.'s negligence set in motion the events that eventually led to the sexual harassment. Therefore Gisentaner asserts that her negligence causes to action arose concurrently with the sexual harassment and are covered since the policies do not exclude negligence.

Several courts have considered issues of concurrent causation wherein the plaintiff alleges that the defendant's negligence eventually led to the acts causing the injuries. *See Commercial Union Ins. Co. v. Roberts,* 7 F.3d 86, 89 (5th Cir. 1993), *Columbus Mutual Ins. Co. v. Fiesta Mart. Inc.*, 987 F.2d 1124, 1128 (5th Cir. 1993). In *Roberts,* the Fifth Circuit examined an issue similar to the one in the instant case. The insurance company sought a declaration that it owed no duty to defend or indemnify under a homeowner's policy for acts of sexual molestation. The plaintiffs in the underlying state action alleged that the homeowner was negligent for failing to obtain medical and psychiatric treatment to prevent him from sexually abusing children. In holding that the insurance company owned no duty to defend or indemnify against the claims of negligence, the court determined that the claims of negligence and the sexual molestation were not severable and distinct but were related and interdependent. *Id.* at 89 (stating that "without the underlying sexual molestation there would have been no injury and obviously, no basis for a suit against Dr. Roberts for negligence") (citations omitted).

Similarly in the instant case, all of Gisentaner's allegations of negligence are interdependent on the claims of sexual harassment, for without the sexual harassment, the negligence claims would not survive. Each and every allegation in Gisentaner's second amended petition arises out of the alleged acts of sexual harassment. *See Old Republic,* 786 F.Supp. at 632. Thus, the ultimate issue becomes whether the policies cover alleged intentional acts constituting sexual harassment. *Id.* As aforementioned, the Americas and Cornhill bodily injury provisions exclude coverage for intentional conduct. Since sexual harassment is intentional conduct, there is no genuine issue of material fact regarding Gisentaner's claims of bodily injury resulting from intentional acts. *See Maayeh v. Trinity Lloyds Ins. Co.,* 850 S.W.2d 193

(Tex. App.--Dallas 1992, no writ) (an act is considered "intentional" when it is substantially certain to cause harm).

Gisentaner argues that even if her claims allege intentional conduct, the personal injury provisions in the Americas and Cornhill policies still cover intentional conduct. In support of this claim, she states that the personal injury provisions in the Americas and Cornhill policies do not require an occurrence to trigger coverage. The Court holds that Gisentaner's claims are outside the scope of the personal injury provisions in the Cornhill and Americas policies. The Americas and Cornhill policies contain a "Broad Form Comprehensive General Liability Endorsement" which provides additional coverage for personal injury. However, sexual harassment is not included in the definition of personal injury in the Cornhill and Americas policies.[6] Although Gisentaner, in her amended petitions, plead detention, invasion of privacy, and imprisonment, it is not the cause of action alleged which determines coverage but the underlying facts giving rise to the alleged actionable conduct. *Figari & Davenport, L.L.P. v. Continental Casualty Co.*, 846 F. Supp 513, 521 (N.D.Tex. 1994) (duty to indemnify is not based upon third party's allegations but upon actual facts which underlie and result in liability); *Continental Casualty Co. v. McAllen School Dist.*, 850 F.2d 1044 (5th Cir. 1988); *Adamo v State Farm Lloyds Co., 853* S.W.2d 673, 676 (Tex. App.--Houston [14th Dist.] 1993, writ denied, *cert. denied,* 114 S. Ct. 1613 (1994). The underlying facts in Gisentaner's second amended petition indicate a claim for sexual harassment, not detention, invasion of privacy, or imprisonment.

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6. *See* Document #33, exhibit A, Document #46, exhibit A: "Personal injury" means injury arising out of one or more of the following offenses committed during the policy period:

(1) false arrest, detention, imprisonment, or malicious prosecution;

(2) wrongful entry or eviction or other invasion of the right of private occupancy;

(3) a publication or utterance

(a) of a libel or slander or other defamatory or disparaging material, or

(b) in violation of an individual's right to privacy.

The Cornhill policy also contains an employee exclusion which expressly excludes coverage for personal injuries arising out of the course of employment. *See* Document #49, exhibit A.[7] Since Gisentaner's claims arose out of her employment with Valsamis, Inc., the employment exclusion provides an additional basis for the Court's finding that the Gisentaner's claims are not covered by the Cornhill broad form endorsement. Therefore, since Gisentaner has failed to show that the Americas and Cornhill broad form comprehensive general liability endorsements provide coverage for her injuries, neither Cornhill nor Americas owe a duty to indemnify Valsamis Inc. based on the broad form endorsements.

The Cornhill policies also contain an additional "Personal Injury Endorsement" pursuant to which Gisentaner seeks coverage. *See* Document 54, exhibit 2, at 16.[8] However, the Cornhill Personal Injury Endorsement by its own terms does not apply to Gisentaner's claims since it restricts its coverage to injuries occurring in the course of "shiprepairing operations." *Id.* Gisentaner's injuries were sustained as a result of sexual harassment, not shiprepairing. Gisentaner, by her own admission (in her second amended petition filed in state court), states that she was hired not as a shiprepairer, but as an administrative worker who was responsible for accounting, payroll, and other administrative duties. *See* Document #46, exhibit G, at 2. Furthermore, Gisentaner has never alleged in any of her pleadings that she was injured while repairing ships. Therefore Americas and Cornhill, as a matter of law, owe no duty to indemnify Valsamis, Inc. pursuant to the bodily injury provisions, broad form comprehensive general liability endorsements, or the Cornhill personal injury endorsement.

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7. Third Party Oil Exclusions- Notwithstanding anything to the contrary contained in this policy . . . this policy shall not apply to:

c. Any liability of any Employee of the Assured with respect to bodily and/or personal injury to or illness or death of another Employee of the Assured sustained in the course of such employment.

8. The Cornhill personal injury endorsement provides that "this insurance shall be extended to include legal liability of the Assured for death or personal injury occurring in the course of an arising from the shiprepairing operations of the assured

OMI issued an Excess Liabilities/Umbrella policy to Valsamis, Inc. requiring OMI to pay all sums Valsamis, Inc. is obligated to pay for damages on account of personal injuries caused by or arising out of each "occurrence." *See* Document #60, exhibit A, at 1. Gisentaner claims that her injuries fall within the definition of personal injury pursuant to the OMI policy.[9] Even if Gisentaner were correct in asserting that her injuries fall within the OMI policy definition of personal injury, her injuries were not caused by an occurrence as is required by the policy. As aforementioned, intentional or willful acts are not occurrences. *Old Republic,* 786 intentional or willful acts are not occurrences. *Old Republic,* 786 F.Supp. at 632. Since all of Gisentaner's claims arise out of the intentional or willful acts are not occurrences. *Old Republic,* 786 F.Supp. at 632. Since all of Gisentaner's claims arise out of the intentional acts of sexual harassment by Valsamis and Papapetrou, those acts are not occurrences. *Id., Roberts,* 7 F.3d at 89-90. Therefore, OMI, as a matter of law, has no duty to defend or indemnify Valsamis, Inc. against Gisentaner's claims.[10]

Gisentaner, in her motion to dismiss, alleges that OMI, Cornhill, and Americas are surplus lines insurers and are required to show proof of financial responsibility pursuant to Tex. Ins. Code Ann. art 1.36, §11 (Supp. 1991).[11] The plaintiff insurance companies have not posted

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9. The term "personal injuries" . . . means bodily injury (including death at any time resulting therefrom), mental injury, mental anguish, shock, sickness, disease, disability, false arrest, false imprisonment, wrongful eviction, detention, malicious prosecution, discrimination, humiliation; also libel, slander or defamation of character or invasion of rights of privacy, except that which arises out of any advertising activities. *See* Document #60, exhibit A, at 2.

10. In support of its Motion for Summary Judgment, OMI also argues that its coverage has not yet been triggered and that a non-assignment clause in the policy precludes coverage. Since there was no occurrence as is required by the OMI policy, the Court will not address OMI's other grounds for summary judgment.

11. The Texas Insurance Code requires an insurance company to "deposit with the clerk of the court in which the action, suit or proceeding is pending, cash or securities or a bond with good and sufficient sureties to be approved by the court in an amount to be determined by the court sufficient to secure the payment of any final judgment that may be rendered in that court proceeding . . .Tex. Ins. Code Ann. art. 1.36, §11 (Supp. 1991).

bond with the Court and Gisentaner requests that the Court strike their pleadings and dismiss the declaratory action. Since the Court may dispense with the bonding requirement, and since the affidavits provided in the responses to the motion to dismiss establish that the insurers were all eligible surplus lines insurers when their policies were issued, Gisentaner's motion to dismiss is denied. *See Mid-American Indem. Ins. Co. v. King*, __S.W.2d __, 38 Tex. Sup. Ct. J. 1018 (July 7, 1995) (insurer which is eligible surplus lines insurer when it issues insurance is exempt from bond requirement).

Based on the foregoing, the Court
ORDERS the following:

(1) the Motion for Summary Judgment (Document #33 is GRANTED;

(2) the Cross Motions for Summary Judgment (Documents #40, 54, 67) are DENIED;

(3) the Motion to Dismiss (Document #66) is DENIED:

(4) the Motions for Summary Judgment (Documents #46, 49 are GRANTED:

(5) the Motion for Summary Judgment (Document #60) is GRANTED.

SIGNED at Houston, Texas, on this the 26 day of September, 1995.

/s/David Hittner
DAVID HITTNER
United States District Judge

APPENDIX E

FILED
SEPT 19 1994
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MICHAEL N. MILBY, CLERK

COURTROOM MINUTES

JUDGE /s/ D Hittner PRESIDING
COURTROOM CLERK /s/ illegible
COURT REPORTER /s/ J. Sanchez
LAW CLERK /s/ illegible

MORNING SESSION 9:00 - 9:40 DATE: 9-19=94
10:25 - 10:30

CA H-94-1013

CORNHILL v. VALSAMIS

DOCKET ENTRY

DH MOTION HEARING (Rptr-/s/Sanchez
(PROCEEDING)

Appearances: S. Sydow f/Relf
G. Kuhn & J. Bain f/Depts

Parties to file motion to Consol.

Re: Motion to Dismiss - Order to Issue

Rule 16 Order Abated
Rule 16 Conf. set for 10-27-94 @ 9:30

APPENDIX F

ENTERED
SEP 06 1994
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MICHAEL N. MILBY, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

AMERICAS INSURANCE COMPANY	§	
	§	
vs.	§	CIVIL ACTION
	§	NO. H-94-1336
VALSAMIS, INC. and	§	
CHERYL GISENTANER	§	

ORDER

On this day came to be heard Defendant Valsamis, Inc.'s Motion to Dismiss. (Docket Entry #9). In this declaratory judgment action, Americas Insurance Company seeks interpretation of a general liability insurance policy that provided coverage to Valsamis, Inc. from July 24, 1991, to July 24, 1992.

Americas Insurance Company filed this action on April 19, 1994.On June 24, 1994, defendant Cheryl Gisentaner filed suit in state court against Americas and 16 other insurers and underwriters whose policies were assigned to her by defendant Valsamis, Inc. in a sexual harassment settlement. Gisentaner and Valsamis now wish to dismiss this action in federal court, asserting that all the insurance policies and underwriters joined in the state action are necessary parties to this lawsuit, that this declaratory judgment action is an anticipatory suit, that the state court action presents novel questions of state law, and that Valsamis is not a proper party to this suit.

I.

Under Rule 12(b) (6), "a claim may not be dismissed unless it appears certain that the plaintiff cannot prove any set of facts in support of her claim which would entitle her to relief." *Benton v. United States*, 960 F.2d 19, 21 (5th Cir. 1992); *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In a motion to dismiss, the allegations of the complaint must be accepted as true, *Cruz v. Beto*, 405 U.S. 319, 322 (1972), and the complaint construed favorably to the pleader, *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

It is in the district court's discretion whether or not to decide a declaratory judgment action. *Rowan Co. v. Griffin*, 876 F.2d 26, 28 (5th Cir. 1989); *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 601 (5th Cir. 1983) (citing *Brillhart v. Excell Ins. Co. of Am.*, 316 U.S. 491, 62 S.Ct. 1173 (1942)). A request for declaratory judgment relief may not be dismissed "on the basis of whim or personal disinclination," *Hollis v. Itawamba County Loans*, 657 F.2d 746, 750 (5th Cir. 1981), but the court may consider a wide variety of factors in its determination. *Rowan* at 29; *Mission* at 601. While these might include 1) whether there is a pending state court proceeding in which the matters in controversy may be fully litigated, 2) which case was filed first, and whether it was filed in anticipation of litigation, 3) whether the suit excluded indispensable parties, 4) whether there is another adequate remedy, 5) inconvenience to parties and witnesses, and 6) judicial economy, "the real question for the court is . . . which (action) will most fully serve the needs and convenience of the parties and provide a comprehensive solution of the general conflict." WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE, § 2758 (1983).

5th Circuit case law "suggests that it is not within the district court's discretion to dismiss a declaratory judgment action simply 'on the ground that the state courts could fully adjudicate all the matters in controversy between the parties in the action already filed in those courts.'" *Sandefer Oil & Gas v. Duhon*, 871 F.2d 526, 528 (5th Cir.

1988), and *Brillhart* at 498, 1177. "(T)he existence of previously initiated state proceedings is merely one factor among many for the court to consider." *Evanston* at 1192.

II.

Americas seeks to define "unambiguous language" of a general liability insurance policy so as to ascertain its liability to the defendants under the policy. It filed this action after the state court approved a legal settlement agreement under which Valsamis assigned his rights under the policy to Gisentaner.

Courts have said that the purpose of a declaratory judgment action is "to afford one threatened with liability an early adjudication without waiting until his adversary should see fit to begin an action after the damage has accrued." *Government Employees Insur. Co. v. LeBlue*, 272 F.Supp 421, 427 (E.D.La. 1967); *Japan Gas Lighter Assoc. v. Ronson Corp.*, 257 F.Supp. 219, 237 (D.C.N.J. 1966). Plaintiff could not have known when or if defendant would file suit elsewhere. There is no indication in the record that Americas' action, taken more than two months before defendant filed his state suit, was "anticipatory" in any sense.

Defendants assert that all of the insurers and underwriters connected to all of the policies assigned to Gisentaner are necessary parties to this declaratory judgment action, and that because the state case might fully litigate the claims before us and all others, this action should be dismissed in favor of the state suit.

Rule 19 of the Federal Rules of Civil Procedure provides that parties are indispensable only if the court finds that the lawsuit cannot proceed without them. *Sandefer* at 519. This lawsuit seeks to clarifiy insurance coverage under general liability policies. It can proceed without the presence of other parties whose coverage issues involve materially different kinds of policies and coverages. Those parties are not indispensable to this action. A judgment rendered in their absence will

not require or forbid any actions which would aid or prejudice them.

Valsamis is a proper party in this lawsuit because the insurance policy was issued to him, he, not Gisentaner, was a party to the contract, he assigned his rights under it as a result of the harassment suit, he must be bound by the judgment of the court, and under the terms of his settlement release, Gisentaner may retain rights against him.

Americas has an interest in resolving the straightforward policy coverage issues he presents, which are not in any sense novel, without enduring litigation on other issues and other types of coverages that don't apply to him. That cannot happen in the state suit.

In light of the above, and because there is no significant inconvenience to parties, but there is equity and judicial economy in resolving straightforward issues of liability and avoiding complicated and lengthy litigation for out of state defendants, the Court hereby

ORDERS that Valsamis, Inc.'s Motion to Dismiss is DENIED.
SIGNED at Houston, Texas, on this 2nd day of September, 1994.

/s/illegible
VANESSA D GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX G

ENTERED
SEP 06 1994
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MICHAEL N. MILBY, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

AMERICAS INSURANCE COMPANY	§	
	§	
vs.	§	CIVIL ACTION
	§	NO. H-94-1336
VALSAMIS, INC. and	§	
CHERYL GISENTANER	§	

ORDER

On this day came to be heard Defendant Cheryl Gisentaner's Motion to Dismiss (Docket Entry #10). In this declaratory judgment action, Americas Insurance Company seeks interpretation of a general liability insurance policy that provided coverage to Valsamis, Inc. from July 24, 1991, to July 24, 1992.

Americas Insurance Company filed this action on April 19, 1994. On June 24, 1994, defendant Cheryl Gisentaner filed suit in state court against Americas and 16 other insurers and underwriters whose policies were assigned to her by defendant Valsamis, Inc. in a sexual harassment settlement. Gisentaner and Valsamis now wish to dismiss this action in federal court, asserting that all the insurance policies and underwriters joined in the state lawsuit are necessary parties to this declaratory judgment action, that this action is an anticipatory suit, and that the state court lawsuit presents novel questions of state law.

I.

Under Rule 12(b) (6), "a claim may not be dismissed unless it appears certain that the plaintiff cannot prove any set of facts in support of her claim which would entitle her to relief." *Benton v. United States*, 960 F.2d 19, 21 (5th Cir. 1992); *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In a motion to dismiss, the allegations of the complaint must be accepted as true, *Cruz v. Beto*, 405 U.S. 319, 322 (1972), and the complaint construed favorably to the pleader, *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

It is in the district court's discretion whether or not to decide a declaratory judgment action. *Rowan Co. v Griffin*, 876 F.2d 26, 28 (5th Cir. 1989); *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 601 (5th Cir. 1983); (citing *Brillhart v. Excell Ins. Co. of Am.*, 316 U.S. 491, 62 S.Ct. 1173 (1942)). A request for declaratory judgment relief may not be dismissed "on the basis of whim or personal disinclination," *Hollis v. Itawamba County Loans*, 657 F.2d 746, 750 (5th Cir. 1981), but the court may consider a wide variety of factors in its determination. *Rowan* at 29; *Mission* at 601. While these might include 1) whether there is a pending state court proceeding in which the matters in controversy may be fully litigated, 2) which case was filed first, and whether it was filed in anticipation of litigation, 3) whether the suit excludes indispensible parties, 4) whether there is another adequate remedy, 5) inconvenience to parties and witnesses, and 6) judicial economy, "the real question for the court is . . . which (action) will most fully serve the needs and convenience of the parties and provide a comprehensive solution of the general conflict." WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE, § 2758 (1983).

5th Circuit case law "suggests that it is not within the district court's discretion to dismiss a declaratory judgment action simply 'on the ground that the state courts could fully adjudicate all the matters in controvery between the parties in the action already filed in those courts.'" *Sandefer Oil & Gas v. Duhon*, 871 F.2d 526, 528 (5th Cir. 1989), citing *Evanston Ins. Co. v. Jimco*, 844 F.2d 1185 (5th Cir. 1988),

and *Brillhart* at 498, 1177. "(T)he existence of previously initiated state proceedings is merely one factor among many for the court to consider." *Evanston* at 1192.

II.

Americas seeks to define "unambiguous language" of a general liability insurance policy so as to ascertain its liability to the defendants under the policy. It filed this action after the state court approved a legal settlement agreement under which Valsamis assigned his rights under the policy to Gisentaner.

Courts have said that the purpose of a declaratory judgment action is "to afford one threatened with liability an early adjudication without waiting until his adversary should see fit to begin an action after the damage has accrued." *Gov't Employees Ins. Co. v. LeBlue*, 272 F.Supp 421, 427 (E.D.La. 1967); *Japan Gas Lighter Ass'n v. Ronson Corp.*, 257 F.Supp. 219, 237 (D.C.N.J. 1966). Plaintiff could not have known when or if defendant would file suit elsewhere. There is no indication in the record that Americas' action, taken more than two months before defendant filed suit, was "anticipatory" in any sense.

Defendant Gisentaner asserts that all of the insurers and underwriters connected to all of the policies assigned to her are necessary parties to this declaratory judgment action, and that because the state case might fully litigate the claims before us and all others, this action should be dismissed in favor of the state suit.

Rule 19 of the Federal Rules of Civil Procedure provides that parties are indispensable only if the court finds that the lawsuit cannot proceed without them. *Sandefer* at 529. This lawsuit seeks to clarifiy insurance coverage under general liability policies. It can proceed without the presence of other parties whose coverage issues involve materially different kinds of policies and coverages. Those parties are not indispensible to this action. A judgment rendered in their absence will not require or forbid any actions which would aid or prejudice them.

Americas has an interest in resolving the straightforward policy coverage issues he presents, which are not in any sense novel, without enduring litigation on other issues and other types of coverages that don't apply to him. That cannot happen in the state suit.

In light of the above, and because there is no significant inconvenience to parties, but there is equity and judicial economy, in resolving straight forward issues of liability and avoiding complicated and lengthy litigation for out of state defendants, the Court hereby

ORDERS that Gisentaner's Motion to Dismiss is DENIED.
SIGNED at Houston, Texas, on this 2nd day of September, 1994.

/s/ illegible
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX H

NO. 94-029954

CHERYL GISENTANER, INDIVIDUALLY AND AS ASSIGNEE OF VALSAMIS, INC.	§	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
V.	§	
AMERICAS INSURANCE COMPANY SOUTHERN MARINE AND AVIATION UNDERWRITERS, INC.; R.L. JARRETT RISK SERVICES, INC., A MEMBER COMPANY OF U.S. RISK INSURANCE GROUP, INC.; CORNHILL INSURANCE PLC.; HANSA MARINE INSURANCE CO. (U.K.) LTD.; ANGLO AMERICAN INSURANCE COMPANY LTD.; UNDERWRITERS AT LLOYD'S; THE PRUDENTIAL ASSURANCE COMPANY LTD.; ALLIANZ INTERNATIONAL INSURANCE COMPANY LTD.; VESTA (U.K) INSURANCE COMPANY LTD.; THE NORTHERN ASSURANCE COMPANY LTD.; SPHERE DRAKE INSURANCE PLC. NO. 1 A/c; SOVEREIGN MARINE & GENERAL INSURANCE COMPANY LTD.; THE TOKIO MARINE & FIRE INSURANCE COMPANY (U.K.) LTD.; THE OCEAN MARINE INSURANCE COMPANY LTD.; UNITED STATES FIRE INSURANCE CO.;	§	

CRUM & FORSTER COMMERCIAL	§	129TH
INSURANCE CO.; OCEAN MARINE	§	JUDICIAL
INDEMNITY; AND	§	DISTRICT
TECHNICAL RISKS, INC.	§	

SUMMARY JUDGMENT

CAME ON to be heard the Motions for Summary Judgment of Defendants **Americas Insurance Company, Southern Marine and Aviation Underwriters, Inc., R. L. Jarrett Risk Services., Cornhill Insurance PLC., Hansa Marine Insurance Co. (U.K.) Ltd., Anglo American Insurance Company Ltd., Underwriters at Lloyd's, The Prudential Assurance Company Ltd., Allianz International Insurance Company Ltd., Vesta (U.K.) Insurance Company Ltd., The Northern Assurance Company Ltd., Sphere Drake Insurance PLC. No. 1 A/c, Sovereign Marine & General insurance Company Ltd., The Tokio Marine & Fire Insurance Company (U.K.) Ltd., Various Underwriters at Lloyd's and London Companies Subscribing to Policies Nos. 92/3253/085, 92/2804/166, and 92/2804/167, The Ocean Marine Insurance Company Ltd., and Ocean Marine Indemnity Company,** and the Court having considered the pleadings and summary judgment evidence and the arguments of counsel, is of the opinion and finds that there is no issue as to any material fact and **Americas Insurance Company, Southern Marine and Aviation Underwriters, Inc. R.L. Jarrett Risk Services, Inc., Cornhill Insurance PLC., Hansa Marine Insurance Co. (U.K.) Ltd., Anglo American Insurance Company Ltd., Underwriters at Lloyd's, The Prudential Assurance Company Ltd., Allianz International Insurance Company Ltd., Vesta (U.K.) Insurance Company Ltd. The Northern Assurance Company Ltd., Sphere Drake Insurance PLC. No. 1 A/c, Sovereign Marine & General Insurance Company Ltd., The Tokio Marine & Fire Insurance Company (U.K.) Ltd., Various Underwriters at Lloyd's and London Companies Subscribing to Policies Nos. 92/3253/085, 92/2804/166, and 92/2804/167, The Ocean Marine Insurance Company Ltd., and Ocean Marine Indemnity Company** are entitled as a matter of law to summary judgment.

It is therefore ORDERED, ADJUDGED, AND DECREED that the Motions for Summary Judgment of **Americas Insurance Company, Southern Marine and Aviation Underwriters, Inc., R.L. Jarrett Risk Services, Inc., Cornhill Insurance PLC., Hansa Marine Insurance Co. (U.K.) Ltd., Anglo American Insurance Company Ltd., Underwriters at Lloyd's, The Prudential Assurance Company Ltd., Allianz International Insurance Company Ltd., Vesta (U.K.) Insurance Company Ltd., The Northern Assurance Company Ltd., Sphere Drake Insurance PLC. No. 1 A/c, Sovereign Marine & General Insurance Company Ltd., The Tokio Marine & Fire Insurance Company (U.K.) Ltd., Various Underwriters at Lloyd's and London Companies Subscribing to Policies Nos. 92/3243/05, 92/2804/166, and 92/2804/167, The Ocean Marine Insurance Company Ltd., and Ocean Marine Indemnity Company** are hereby GRANTED.

It is further ORDERED, ADJUDGED, AND DECREED that Plaintiff Cheryl Gisentaner take nothing against **Americas Insurance Company, Southern Marine and Aviation Underwriters, Inc., R.L. Jarrett Risk Services, Inc., Cornhill Insurance PLC., Hansa Marine Insurance Co. (U.K.) Ltd., Anglo American Insurance Company Ltd., Underwriters at Lloyd's, The Prudential Assurance Company Ltd., Allianz International Insurance Company Ltd., Vesta (U.K.) Insurance Company Ltd., The Northern Assurance Company Ltd., Sphere Drake Insurance PLC. No. 1 A/c, Sovereign Marine & General Insurance Company Ltd., The Tokio Marine & Fire Insurance Company (U.K.) Ltd., Various Underwriters at Lloyd's and London Companies Subscribing to Policies Nos. 92/3243/05, 92/2804/166, and 92/2804/167, The Ocean Marine Insurance Company Ltd., and Ocean Marine Indemnity Company.**

It is further ORDERED, ADJUDGED, AND DECREED that **Americas Insurance Company, Southern Marine and Aviation Underwriters, Inc., R.L. Jarrett Risk Services, Inc., Cornhill Insurance PLC., Hansa Marine Insurance Co. (U.K.) Ltd., Anglo American Insurance Company Ltd., Underwriters at Lloyd's, The Prudential Assurance Company Ltd., Allianz International Insur-**

ance Company Ltd., Vesta (U.K.) Insurance Company Ltd., The Northern Assurance Company Ltd., Sphere Drake Insurance PLC. No. 1 A/c, Sovereign Marine & General Insurance Company Ltd., The Tokio Marine & Fire Insurance Company (U.K.) Ltd., Various Underwriters at Lloyd's and London Companies Subscribing to Policies Nos. 92/3243/05, 92/2804/166, and 92/2804/167, The Ocean Marine Insurance Company Ltd., and Ocean Marine Indemnity Company recover all costs incurred in this action from Cheryl Gisentaner, for which let execution issue if such costs are not timely paid.

SIGNED this the 26 day of June, 1996

/s/illegible
JUDGE PATRICK W. MIZELL

APPROVED AS TO FORM
AND SUBSTANCE:

COOK & ROACH, L.L.P.

BY: /s/illegible
Robert M. Roach, Jr.
SBOT No. 16969100
Michael L. Navarre
SBOT No. 00792711

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Houston, Texas 77002
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(713) 652-2029 Fax no.

ATTORNEYS FOR DEFENDANT,
R.L. JARRET RISK SERVICES, INC.

APPENDIX I

NO. 94-29954

CHERYL GISENTANER, INDIVIDUALLY AND AS ASSIGNEE OF VALSAMIS, INC.	§	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
VS.	§	129TH
AMERICAS INSURANCE COMPANY, ET AL.,	§	JUDICIAL DISTRICT

SUMMARY JUDGMENT

On this day came on to be heard the Motion for Summary Judgment of Defendant, TECHNICAL RISKS, INC., and the Court, having considered the pleadings and summary judgment evidence and the arguments of counsel, finds that there is no issue as to any material fact that TECHNICAL RISKS, INC. is entitled to summary judgment as a matter of law.

It is, therefore, ORDERED, ADJUDGED and DECREED that the Motion for Summary Judgment of TECHNICAL RISKS, INC. is hereby GRANTED.

It is further ORDERED, ADJUDGED and DECREED that plaintiff, CHERYL GISENTANER, take nothing against TECHNICAL RISKS, INC. Costs assessed against party incurring same, as to all parties. This modifies all prior orders assessing costs.

SIGNED this 14 day of October, 1996

/s/illegible
JUDGE PRESIDING

APPROVED AS TO FORM AND SUBSTANCE:

LEBOEUF, WITTENMYER & UNDERWOOD, P.C.

By:_____

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ATTORNEYS FOR DEFENDANT,
TECHNICAL RISKS, INC.

APPENDIX J

FILED
JUN 10 1996
CHARLES BACARISSE
DISTRICT CLERK
HARRIS COUNTY, TEXAS

LEGGE, FARROW, KIMMITT & MC GRATH, L.L.P.
Attorneys at Law
5718 Westheimer Road, Suite 1850, Houston, Texas 77057
(713) 917-0888

May 31, 1996

Honorable Patrick Mizell
1019 Congress
16th Floor
Houston, Texas 77002

RE: *Cheryl Gisentaner, Individually and as Assignee of Valsamis, Inc. v. Americas Insurance Company, et al.*, Cause No. 94-029954 in the 129th Judicial District Court of Harris County, Texas

Dear Judge Mizell:

Interested Underwriters subscribing to Policy No. 92/3253/085, Policy No. 92/2804/166, and Policy No. 92/2804/167 (collectively "Cornhill"); Americas Insurance Company ("Americas"); and Ocean Marine Indemnity Company ("OMI") jointly submit this letter request. Cornhill, Americas and OMI request that the Court consider only the arguments presented in their original motions for summary judgment. Accordingly, Cornhill, Americas, and OMI request that the Court enter summary judgment in their favor on the coverage issues based only on the grounds of *res judicata* and we withdraw any request for summary judgment relief independent of the doctrine of *res judicata*.

Cornhill, Americas, and OMI also request that the Court enter judgment in their favor on the bad faith issues.

A hearing on Cornhill, Americas, and OMIs' respective motions was held on February 5, 1996. At the hearing, all parties were provided with an opportunity to present their arguments on the preclusive effect of the federal court's judgment on the coverage issues, as well as the bad faith issues presented by Gisentaner's Petition. Because the issues of *res judicata* and bad faith have been briefed by all parties and heard by the Court, no further briefing or hearing is necessary, and Cornhill, Americas and OMI respectfully request that the court render judgment in their favor only on those grounds.

At this time, neither Cornhill, Americas, no OMI intend to file an amended motion for summary judgment and ask that the Court pass the current hearing date of June 24, 1996.

Because no further consideration is necessary, Cornhill, Americas and OMI request that the Court enter an order on their original motions for summary judgment at it earliest convenience.

Respectfully submitted,

LEGGE, FARROW, KIMMITT
& McGRATH, L.L.P.
/s/illegible
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BROWN, SIMS, WISE & WHITE

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ATTORNEYS FOR OCEAN MARINE
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	Robert M. Roach, Jr., Esq. Cook & Roach, L.L.P. Texaco Heritage Plaza 1111 Bagby, Suite 2650 Houston, Texas 77002	VIA TELEFAX (713) 652-2029
	William B. Underwood, III, Esq. LeBoeuf, Wittenmyer, Underwood & Williams, P.C. 11757 Katy Freeway, Suite 1000 Houston, Texas 77079-1732	VIA TELEFAX (713) 493-9031

APPENDIX K

NO. 94-29954-A

CHERYL GISENTANER	§	IN THE
Individually and as	§	DISTRICT COURT OF
Assignee of VALSAMIS, INC.	§	HARRIS COUNTY,
	§	TEXAS
v.	§	129TH
	§	JUDICIAL DISTRICT
AMERICAS INSURANCE	§	
COMPANY, et al	§	

FINAL SUMMARY JUDGMENT

On the 31 day of October, 1995, came on to be considered the Motion for Summary judgment filed by Defendants, United State Fire Insurance Company and Crum & Forster Commercial Insurance Company, and the Court, having considered the pleadings and summary judgment evidence and the arguments of counsel, is of the opinion and finds that there is no genuine issue of fact involved in this case and that Defendants' Motion for Summary Judgment should be granted. It is, therefore,

ORDERED, ADJUDGED and DECREED that Plaintiff Cheryl Gisentaner take nothing against Defendants United States Fire Insurance Company and Crum & Forster Commercial Insurance Company, and that Defendants United States Fire Insurance Company and Crum & Forster Commercial Insurance Company, recover all costs in their behalf expended of and from Plaintiff, for which let execution issue if such costs are not timely paid.

SIGNED the 31 day of October, 1995

/s/illegible
JUDGE PRESIDING

PRESENTED BY:

HAYES, McCONN, RICE & PICKERING

By: /s/illegible
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ATTORNEY FOR DEFENDANTS
CRUM & FORSTER COMMERCIAL
INSURANCE COMPANY and
UNITED STATES FIRE INSURANCE
COMPANY

APPENDIX L

	Consolidated Federal Actions	State Action No. 94-29954
INSURERS	No.H-94-1336 Americas/Southern Marine	Americas/Southern Marine
	No. H-94-1013 Cornhill Group*	Cornhill Group*
	No. H-94-1977 Ocean Marine Ins. Co., Ltd. Ocean Marine Indemnity	Ocean Marine Ins. Co. Ltd. Ocean Marine Indemnity
	NOT A PARTY	Crum & Forster/United State Fire
AGENT/ BROKER	**NOT A PARTY**	R.L. Jarrett Risk Services, Inc. (a member of U.S. Risk Ins. Group, Inc.)
AGENT	**NOT A PARTY**	Technical Risks, Inc.
POLICIES	No. H-94-1336 Americas Policy No. 27277	Americas Policy No. 27277
	No. H-94-1013 R.L. Jarrett Cornhill Technical Risks Policy Nos. 92/3253/085 92/2804/166 92/2804/167	R.L. Jarrett/Cornhill Technical Risks Policy Nos. 92/3253/085 92/2804/2166 92/2804/167

	Consolidated Federal Actions	State Action No. 94-29954
POLICIES	No. H-94-1977 R.L. Jarrett/OMI/ Technical Risks Umbrella Policy Policy No. 92/3375	R.L. Jarrett/OMI/ Technical Risks Umbrella Policy Policy No. 92/3375
	NOT REPRESENTED	Crum & Forster/U.S. Fire/ Technical Risks Policy Nos. 407/07/70/04 407/08/88/29
ISSUES	Coverage Duty to defend Cooperative clause Notice	Coverage Duty to defend Cooperative clause Notice Agency DTPA Insurance code violations Breach of duty of good faith and fair dealing Negligence Stowers duty Conspiracy Fraud Breach of contract Contribution indemnity Comparative negligence

***Cornhill Group Includes**

Cornhill Insurance PLC, Hensa Marine, Anglo American, Southern Marine & Aviation Underwriters, Inc., Underwriters at Lloyd's, Prudential Assurance Co., Ltd., Allianz Int'l Ins. Co., Ltd., Vesta (UK) ins. Co., Ltd., The Northern Assurance Co., Ltd., Sphere Drake Ins. Plc., Sovereign Marine & General Ins. Co., Ltd., Tokio Marine & Fire Ins. Co., (UK) Ltd.

APPENDIX M

FILED
JUL 14 1994
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MICAHEL N. MILBY, CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CORNHILL INSURANCE PLC., HANSA MARINE INSURANCE CO. (UK) LTD., AND ANGLO AMERICAN INSURANCE COMPANY LTD.,	§	
Plaintiffs,	§	C.A. No. H-94-1013
v,	§	
VALSAMIS, INC.,	§	
Defendant		

DEFENDANT CHERYL GISENTANER'S MOTION TO DISMISS

Defendant CHERYL GISENTANER, Individually and as Assignee of Defendant Valsamis, Inc., moves to dismiss or abate this proceeding on the following grounds:

I.

STATEMENT OF THE PROCEEDINGS

1. This is a declaratory judgment action brought by

Cornhill Insurance Plc., Hansa Marine Insurance Co. (UK) Ltd., and Anglo American Insurance Company Ltd. ("the Underwriters"), the Underwriters of a comprehensive general liability policy under cover note number 92/3253/085 which insured Defendant Valsamis, Inc. for the period beginning July 24, 1992 and ending on July 24, 1993. Plaintiffs seek a declaratory judgment under the Federal Declaratory Judgment Act, based upon diversity of citizenship, to determine the validity of defenses to coverage and the duty to defend under that plicy, as it relates to a tort action brought against Valsamis, Inc. styles *Cheryl Gisentanar v. Dimitrios Valsamis, Christos Papapetrou, and Valsamis, Inc.*; Cause No. 92-49457; in the 125th Judicial District Court of Harris County, Texas ("the Gisentaner action").

2, Defendant Valsamis, Inc. is the policy holder and its owner, Dimitrios Valsamis, is an additional insured under the policy at issue in this proceeding.

3. The Gisentaner action was filed on October 29, 1992. Plaintiffs were notified of the proceeding but failed to defend. In December 1993, after being called to trial, the parties reached a settlement. That agreement was formally entered on December 31, 1993, and included execution of an agreed judgment, an assignment of all of Valsamis, Inc.'s rights and claims under the policy at isue in this case and other olicies in effect during the relevant time period.

4. Cheryl Gisentaner, individually, as a judgment creditor of Valsamis, Inc., and as an assignee of Valsamis, Inc.'s causes of action for bad faith and insurance code violations, is suing Americas and 18 other insurance defendants in state district court in Houston, Harris County, Texas.[1] The State Court Action is a comprehensive effort to resolve in a single proceeding all the claims of Ms. Gisentaner, the injured party, the insured and the insurers relating to injuries and dam-

---

1. The suit was filed on June 22, 1994, the same date this motion is being filed, and is styled *Cheryl Gisentaner, Individually, and on behalf of Valsamis, Inc., v. Americas Insurance Company, et al.* in the District Court of Harris County, Texas, 129th Judicial District, Cause No. 94-29954 (hereinafter "State Court Action").

ages sustained by Ms. Gisentaner during the period from March 1992 through September 1992.

5. On December 31, 1993, Defendant Valsamis, Inc. assigned all of its rights, interests and claims under Policy No. 92/3253/085, as well as other policies, to Cheryl Gisentaner, the Plaintiff in Cause No. 92-049457; *Cheryl Gisentaner v. Dimitrios Valsamis, Christos Papapetrou, and Valsamis, Inc.*; in the 125th Judicial District Court of Harris County, Texas, as part of a comprehensive settlement agreement in that case. Plaintiffs refused to defend or provide coverage for Ms. Gisentaner's claims. Attached hereto as Exhibit "A: and incorporated herein by reference is a true and correct copy of the settlement agreement and assignment executed by Valsamis, Inc. on December 31, 1993.

II.

FAILURE TO JOIN NECESSARY PARTIES.

6. Defendant Gisentaner moves that this case be dismissed on the grounds that Plaintiffs hae failed to join parties needed for the just adjudication of the claims made in Plaintiffs' Complaint pursuant to the requirements of Rule 19 of the Fed. R. Cov. P. Specifically, this case concerns coverage issues under one insurance policy arising out of claims made by Cheryl Gisentaner in the Gisentaner action. However, there are at least six (6) other policies and 14 underwriters on those policies which were in effect during some portion of the period at issue in the Gisentaner action. Gisentaner's claims which give rise to the judgment in the Gisentaner action arose during the time period from March 1992 through September 1992. The policy upon which this case is based is a comprehensive general liability policy which took effect on July 24, 1992.

7. Valsamis, Inc. was insured under a different comprehensive general liability policy during the period from July 24, 1991, to July 24, 1992, which incorporates a portion of the period during which Ms. Gisentaner's claims arose. In addition, the policy at issue in

this action is only the primary policy which was in effect during the period from July 24, 1992 through July 24, 1993. During that time period, Valsamis, Inc. carried two (2) excess comprehensive general liability policies, an employer's liability policy, and an umbrella policy, all of which may provide all or part of the coverage for the judgment entered in the Gisentaner action.

8. In order to completely resolve all issued in controversy between Plaintiffs, the other insurers, and Gisentaner, the assignee of Valsamis, Inc., it is neessary to join all insurance carriers and underwriters in one proceeding. An attempt to litigate the issues piecemeal will not only thwart judicial economy, but is likely to result in inconsistent rulings since the issues are purely based upon state law. Piecemeal litigation could severely prejudice the right of one or more of the parties who have not been joined in this action, and who may have an interest in the outcome.

9. The other insurance carriers and underwriters who are necessary parties to the complete and just adjudication of this cause inclue the following: United States Fire Insurance Co.; Southern Marine & Aviation Underwriters, Inc.; Technical Risks, Inc.; R.L. Jarrett Risk Services, Inc. (a member of U.S. Risk Insurance Group, Inc.); Americas Insurance Company; Crum and Forster; The London Companies (composed of Underwriters at Lloyd's, The Prudential Assurance Company Ltd., Allianz International Insurance Company Ltd., Vesta (U.K.) Insurance Company Ltd., The Northern Assurance Company Ltd., Sphere Drake Insurance Plc. No. 1 A/c, Hansa Marine Insurance Company (U.K.) Ltd., Sovereign Marine & General Insurance Company Ltd., The Tokio Marine & Fire Insurance Company (U.K.) Ltd., and The Ocean Marine Insurance Company Ltd.); and Ocean Marine Indemnity.

III.

PLAINTIFF IS ESTOPPED FROM INVOKING THE JURISDICTION OF THIS COURT UNDER THE FEDERAL DECLARATORY JUDGMENT ACT

10 Prior to the entry of the Final Judgment in the Gisentaner action, Plaintiffs filed a Petition in Intervention in the 125th Judicial District Court of Harris County, wherein they sought to appear as a party in the state court litigation to protest the release and settlement agreement which is attached as Exhibit "A". In their Petition in Intervention, which is attached hereto as Exhibit "B", Plaintiffs expressly alleged that there was no coverage under their policy, and that the actions of the plaintiff and defendants in entering into the agreement constituted a fraud on the Court. (Original Petition in Intervention, page 5.) Plaintiffs also sought a motion for continuance in order to prevent the Court from entering its Final Judgment. A true and correct copy of Plaintiffs' Motion for Continuance is attached hereto as Exhibit "C". Plaintiffs' Petition in Intervention was filed on February 25, 1994, three (3) days before the hearing on Final Entry of Judgment in the 125th Judicial District Court. The 125th Judicial District Court denied Plaintiffs the relief they requested in their Petition in Intervention and Motion for Continuance. The Final Judgment was entered in the underlying cause on February 28, 1994. Plaintiffs did not appeal that judgment within the time period allowed by Texas law.

11. In their Complaint, Plaintiffs are essentially seeking the identical relief which they sought in the state court through their Petition in Intervention. However, all claims that were litigated or could have been litigated before the state court are barred in a subsequent federal court proceeding pursuant to the doctrine of *res judicata*. *Langston v. Insurance Co. of North America*, 827 F.2d 1044, 1046 (5th Cir. 1987), citing *Stevenson v. Internatonal Paper Co.*, 516 F.2d 103, 108 (5th Cir. 1975). Having waived their right to appeal under Texas law, the Plaintiffs should not now be permitted to invoke the jurisdiction of this Court and circumvent the state appeals process to try and collaterally attack a Final Judgment involving purely issues of state

law. Such conduct constitutes an abuse of the Federal Declaratory Judgment Act.

12. Plaintiffs were aware of the pending settlement negotiations and state court proceedings from their inception. Plaintiffs refused to provide a defense at any time during those proceedings. Further, Plaintiffs were invited to participate in mediation and join in the settlement negotiations, but Plaintiffs declined. On September 8, 1993, almost a year after they were originally notifed of the suit, Plaintiffs issued a letter denying coverage under the policy. Plaintiffs again denied coverage in letters dated December 17, 1993 and January 27, 1994. (Plaintiffs Complaint, pages 3-4, §§ 11 and 12.) Despite knowledge of the claims, the case, and the ongoing settlement negotiations, Plaintiffs waited until three (3) days before entery of Final Judgment to attempt to intervene and block the Settlement Agreement which included entry of an Agreed Judgment in the amount of $1,250,000.00.

13. By its actions, Plaintiffs have forfeited their right to pursue this essentially duplicative litigation in federal court. Rather than appeal the 125th Judicial District Court's denial of the relief it requested in its Petition in Interventon when appropriate, Plaintiffs seek to lure this Court into affording them an independent collateral review of the denial of their requested relief by the State Court. Having elected to submit their claims to state court, Plaintiffs were bound to utilize the Texas appellate procedure for any relief they did or could have pursued in that action. Accordingly, this Court should dismiss Plaintiffs' Complaint on the basis of *res judicata* and/or collateral estoppel.

IV.

JURISDICTION UNDER THE FEDERAL DECLARATORY ACT IS DISCRETIONARY

14. The Federal Declaratory Judgment Act "gives the Court a choice, not a command." *Dresser Industries, Inc. v. Insurance Company of North America,* 358 F.Supp. 327, 330 (N.D. Tex.), aff'd 475

2d 1402 (5th Cir. 1973). This court may consider a variety of factors n determining whether to decide a declaratory judgment suit, includng (1) whether there is a pending state court proceeding in which the natters in controversy between the parties may be fully litigated, (2) whether the declaratory complaint was filed in anticipation of another uit and is being used for the purpose of forum shopping, (3) whether here would be possible inequities in permitting the Plaintiff to gain recedence in time and forum, and (4) inconvenience to the parties or itnesses. *Rowan Companies, Inc. v. Griffin,* 876 F.2d 26, 29 (5th Cir. 989).

15. It is well established that "a district court 'is not reuired to provide declaratory judgment relief, and it is a matter for the istrict court's sound discretion whether to decide a declaratory judgent action.'" *Rowan Companies, Inc. v. Griffin,* 876 F.2d at 28 (citaons omitted). In addition, a number of federal courts had held that whether a case presents novel questions of state law should also be a onsideration in determining whether to grant declaratory judgment elief. *Decisneros v. Younger,* 871 F.2d 305, 309 (2d Cir. 1989).

. This Is An Anticipatory Suit.

16. Although the State Court Action was filed after this roceeding, this lawsuit was clearly filed by Plaintiffs in anticipation f that proceeding. Plaintiffs have been aware of claims by Ms. isentaner since at least October 1992. This suit was filed by Plainffs on March 28, 1994, the day the judgment in the Gisentaner case ecame final.

17. Thus, it is clear that what prompted Plaintiffs to file his action was the execution by its insured, Valsamis, Inc., and isentaner of the Settlement Agreement and Mutual Release, and the ntry of the Judgment arising out of that settlement. Plaintiffs knew hat it was only a matter of time before Gisentaner would be filing suit gainst it and the other insurers carrying policies during the relevant me period to press the same issues raised in this case.

18. One of the factors weighing against the exercise of federal jurisdiction is whether the declaratory complaint is filed in anticipation of another suit and is being used for the purpose of forum shopping. *Rowan Companies, Inc. v. Griffin*, 876 F.2d 26, 29 ("declaratory judgment relief may be denied . . . because the declaratory complaint was filed in anticipation of another suit and is being used for purpose of forum shopping"); *Mission Insurance Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 602, n.3 (5th Cir. 1983) ("anticipatory suits are disfavored because they are an aspect of forum shopping"); *909 Corp. v. Village of Billingbrook Police Pension Fund*, 741 F.Supp. 1290, 1292-93 (S.D. Tex. 1990) ("the court cannot allow a party to secure a more favorable forum by filing an action for declaratory judgment when it has notice that the other party intends to file suit involving the same issues in a different forum").

19. A declaratory judgment claim should be dismissed if it was filed for the purpose of anticipating a trial of the same issues in a court of coordinate jurisdiction. *909 Corp. v. Village of Billingbrook, supra*, at 1292.

B. This Case Presents Novel Questions Of State Law.

20. This case involves only questions of state law dealing with the interpretation and application of various insurance policies and the implications of those laws when multiple policies are involved. Some of these issues are without precedent in the Texas courts.[2] Where federal law is not implicated, and the governing state law involves "a novel state law theory" a federal district court should strongly consider exercising its descretion to abstain from Jurisdiction. *Decisneros v. Younger*, 871 F.2d at 309.

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2. For example, the Texas Supreme Court recently declined to decide the appropriate test to determine which of several policies are triggered by a continuing occurrence. *American Physicians Insurance Exchange v. Garcia*, 37 Tex. S.Ct. Journal 561, 569, n.20 (Tex. 1994). This case involves both a single continuing occurrence and separate occurrences that implicate several different policies, because the policy periods changed approximately half way through the relevant time period, and there is some overlapping coverage.

21. This Court, sitting solely in diversity jurisdiction, is obligated to apply state law. The potential for inconsistent and contradictory rulings issued from different forums is increased when the issues in dispute are without precedent. By dismissing the present action, or waiting for the state court to speak first, this Court would prevent such inconsistent or contradictory rulings, and would insure that it did not misinterpret Texas law. There is no federal interest that will be served by providing declaratory relief in this case.

C. The Pending State Court Action Has Jurisdiction Over All Parties In Interest.

22. The present action should be dismissed or stayed because there is a pending state court proceeding in which the matters in controversy between the parties may be more fully litigated. *Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491, 494-95, 62 S.Ct. 1173, 1175-76, (1942); *Warren Companies, Inc. v. Griffin*, 876 F.2d at 29. In fact, there are already two proceedings pending in federal court arising out of the *Gisentaner* case initiated by two of Valsamis, Inc.'s insurers. In addition to this case, there is presently pending in Judge Gilmore's Court, C.A. No. H-94-1336, *Americas Insurance Company v. Valsamis, Inc. and Cheryl Gisentaner.* Defendant Gisentaner has filed a similar motion to dismiss or abate that proceeding. Even with these two proceedings, a substantial number of interested parties have not been joined.

23. A brief comparison of the parties and issues joined in the two actions demonstrates that not only can all issues be fully litigated in the State Court Proceeding, but also that the State Court Proceeding is the only forum where all issues and parties can be joined to fully litigate this controversy:

	Federal Actions	State Action
Insurers	No. H-94-1335-Americas	Americas
	No. H-94-1013-Cornhill	Cornhill
	Hansa Marine	Hansa Marine
	Anglo American	Anglo American
		Southern Marine & Aviation Underwriters, Inc.
		Prudential Assurance Co., Ltd.
		Allianz Int'l Ins. Co. Ltd.
		Vesta (UK) Ins. Co. Ld.
		The Northern Assurance Co. Ltd.
		Sphere Drake Ins. Plc.
		Sovereign Marine & General Ins. Co. Ltd.
		Tokio Marine & Fire Ins. Co. (UK) Ltd.

	Federal Actions	State Action
		Ocean Marine Ins. Co. Ltd.
		Ocean Marine Indemnity
		Crum & Forster
		United States Fire
		R.L. Jarrett Risk Services In. (a member of U.S. Risk, Ins. Group, Inc.) and
		Technical Risks, Inc.
Insured	No. H-94-1336, Valsamis, Inc.	Valsamis, Inc. (through its Assignee Cheryl Gisentaner)
	No. H-94-1013, Valsamis, Inc.	

Insured Party	No. H-94-1336, Cheryl Gisentaner No. H-94-1013, Cheryl Gisentaner	Cheryl Gisentaner
Policies	No. H-94-1336, Americas, Policy No. 27277 No. H-94-1013, R.L. Jarrett Policy No. 92/3253/085	Americas Policy No. 27277 R.L. Jarrett Policy Nos. 92/3253/086 92/2804/166 92/2804/167 R.L. Jarrett Umbrella Policy No. 92/3375 Crum U Forster Policy Nos. 407/07/70/04 407/08/88/29
Causes of Action	No. H-94-1336 coverage cooperative clause No. H-94-1013 coverage	coverage cooperative clause DTPA insurance code violations breach of duty of good faith and fair dealing negligence Stowers duty

24. Thus, it is obvious that the State Court Action contains numerous insurers and issues that are not joined in the federal action. Judicial economy alone strongly favors allowing the state action to proceed. Furthermore, counsel for Plaintiffs in both Federal proceedings have represented to the undersigned counsel their desire to join all carriers in one proceeding, and that any attempts at settlement would be futile unless all parties are joined.

25. There is a growing body of federal authority which holds, under a variety of rationales, that a district court does not abuse its descretion where it dismisses or stays a single facet of an insurance

dispute in favor of a more comprehensive suit pending elsewhere.[3] The growing number of federal cases addressing this issue focus on the advantages of a single comprehensive resolution of an insurance dispute involving multiple carriers, multiple time periods, and multiple layers of insurance coverage. *Aetna Casualty v. Kerr-McGee Chemical*, 875 F.2d 1252, 1261, n.12 (7th Cir. 1989).

26. Resolution of the present action will **not** resolve all the outstanding disputes between all interested parties, but instead will expose the parties to inconsistent judgments in different forums. Thus, piecemeal litigation could severly prejudice the right of one or more of those parties. If the federal and state actions are to proceed concurrently, there is a real possibility that different courts might interpret the same language differently. This rationale was found particularly compelling by the Second Circuit in the *Kerr-McGee* case. *Aetna Casualty v. Kerr-McGee Chemical*, 875 F.2d at 1261.

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3. *Aetna Casualty v. Kerr-McGee Chemical*, 875 F.2d 1252, 1261 (7th Cir. 1989); *General Reinsurance Corp. v. Ciba-Geigy Corp.*, 853 F.2d 78, 80-82 (2nd Cir. 1988); (the district court placed "the greatest weight on the third factor, the avoidance of piecemeal litigation"; "the risk of peacemeal litigation is real and should be avoided"; "favor abstention where the builk of the litigation would necessarily revolve around the state-law rights of numerous parties"); *Transamerica Occidental Life Insurance Co. v. DiGregorio*, 811 F.2d 1249, 1253-55 (9th Cir. 1987) ("a district judge has discretion to decline jurisdiction in favor of pending state court litigation when a party seeks to use the Declaratory Judgment Act to deprive a plaintiff of his choice of forum or to encourage a race to judgment"; "all issues raised in Transamerica's suite may be fully litigated in state court"; "many of the issues . . . are more appropriate for state court resolution"; "no compelling federal interests are at stake, the federal action was not too far advanced"); *Lumberman's Mutual Casualty Co. v. Connecticut Bank & Trust Co.*, 806 F.2d 411, 414-15 (2d Cir. 1986) (federal declaratory judgment action filed two years before insurer named as defendant in state action was stayed in deference to state action; "the critical factor to us . . . is the desirability of avoiding piecemeal litigation and the possibility of two interpretations of the same policy language in different courts, leaving the insured possibly with insufficient coverage after paying years of premiums"); *Liberty Mutual Ins. Co. v. Foremost-McKesson, Inc.*, 751, F.2d 475, 477 (1st Cir. 1985).

27. The only way to avoid piecemeal litigation in the present situation is to either dismiss or stay this proceeding in deference to the state action which is (1) more comprehensive, (2) involves all of Valsamis, Inc.'s insurers that have denied coverage, and (3) involves purely questions of state law.

WHEREFORE, PREMISES CONSIDERED, Defendant CHERYL GISENTANER respectfully requests that the Court dismiss the present action, or, alternatively, abate all proceedings in this matter until a completion of all proceedings in the State Court Action. Defendant Gisentaner respectfully requests all other relief to which she may show herself justly entitled.

Respectfully submitted,

/s/Joan M. Lucci Bain
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ATTORNEY FOR DEFENDANT
CHERYL GISENTANER

APPENDIX N

FILED AUG 15 1995
UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
MICHAEL N. MILBY, CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CORNHILL INSURANCE PLC., ET AL., AMERICAS INSURANCE CO. and OCEAN MARINE INDEMNITY CO.,	§ CIVIL ACTION § NO. H-94-1336 § and § CIVIL ACTION
Plaintiffs	§ NO. H-94-1977 § CONSOLIDATED
v.	§ INTO § CIVIL ACTION
VALSAMIS, INC. and CHERYL GISENTANER,	§ NO. 94-1013 §
Defendants	§ (JUDGE § DAVID HITTNER)

DEFENDANT CHERYL GISENTANER'S SUPPLEMENT TO THE MOTIONS TO DISMISS CORNHILL INSURANCE, PLC., AMERICAS INSURANCE COMPANY AND OCEAN MARINE INDEMNITY COMPANY

TO THE HONORABLE JUDGE OF THIS COURT:

Defendant Cheryl Gisentaner, on her own behalf and on behalf of Valsamis, Inc., supplements the previously filed Motions to Dismiss the complaints of Cornhill, Inc., Plc.; Americas Insurance Company; and Ocean Marine Indemnity Company, filed in Civil Action Nos. H-94-1013, H-94-1336, and H-94-1977, respectively, before these

actions were consolidated before this Court. In addition to the arguments and authorities warranting dismissal of these actions that were previously submitted, Plaintiff would show that this case should be dismissed for the following reasons:

I.

All of the Plaintiffs in this proceeding have invoked this Court's jurisdiction based upon diversity of citizenship. Therefore, this Court is required to apply and interpret Texas law in resolving the controversy between the parties. The Plaintiffs do not acquire any rights, privileges or defenses by virtue of bringing this action in federal court.

II.

Defendant Gisentaner filed suit in state court on July 22, 1994, against all of the Plaintiffs to this action, as well as other Defendants who are liable to Gisentaner individually and as assignee of Defendant Valsamis, Inc.'s claims against his insurers.[1] That suit styled *Cheryl Gisentaner, Individually and as Assignee of Valsamis, Inc. v. Americas Insurance Company, et al,* is pending in the 129th Judicial District Court of Harris County, Houston, Texas, Cause No. 94-29954 ("The State Court Action"). On June 24, 1995, Judge Greg Abbott entered an Order abating that proceeding against the federal Plaintiffs only, for a period of 90 days to allow this Court to rule on Defendants' motions to dismiss the federal action. In addition, Judge Abbott declined to hear arguments concerning the federal Plaintiffs' right to appear in any proceeding without posting proof of financial responsibility as required by the Texas Insurance Code, again deferring to this Court's jurisdiction for a period of 90 days.

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1. Americas filed its declaratory action in this court on April ____, 1995. Cornhill Insurance, P.L.C., Hansa Marine Insurance Co. (U.K.) Ltd., and Anglo American Insurance Co., Ltd. filed this action on _____, 1995. The other interested underwriters joined the Cornhill Plaintiffs on _____, 1995. OMI filed suit on _____, 1995.

III.

Texas has enacted a statute derived from the Uniform Unauthorized Insurers Process Act which provides that before an unauthorized insurer (including surplus lines insurers) files or has filed any pleading in any court action, suit, or proceeding instituted against that insurer through service of process, notice, order, demand, or pleading, that insurer must provide the court with proof of financial responsibility. Plaintiffs Southern Marine, Ocean Marine, Americas, and the Cornhill Plaintiffs are all surplus lines insurers, a type of unauthorized insurer, which have failed to provide this court with proof of financial responsitility as required by the Texas Insurance Code. Specifically, Plaintiffs were required to:

> deposit with the clerk of the court in which the action, suit or proceeding is pending, cash or securities or a bond with good and sufficient sureties to be approved by the court in an amount to be determined by the court sufficient to secure the payment of any final judgment that may be rendered in that court proceeding; . . .

Tex. Ins. Code Ann. art. 1.36, §11 (Supp. 1991).

The purpose of § 11 is to protect Texas residents, domestic corporations, and foreign corporations lawfully doing business in Texas from the practices of unsupervised and unregulated foreign insurers. Specifically, § 11 is designed to insure that foreign insurance companies demonstrate their ability to satisfy and judgments Texas plaintiffs are able to obtain against them. *See Retail Union Health & Welfare Fund v. Seabrum,* 20 Ga. 695, 242 S.e.2d 18, 20 (1978); *Dean Construction Co. v. Agricultural Ins. Co.,* 249 N.Y.S.2d 247, 249 (1964).

Plaintiffs had constructive notice of this requirement as they were each charged by law with awareness of all statutory requirements before placing its first insurance policy in Texas. Tex. Ins. Code Ann. art. 21.42 (1981). It is also well-established that the principle applied in contract construction — that a statute bearing on the subject matter

of the contract becomes a part of the contract just as though it had been copies therein — applies to the construction of insurance contracts. *Harkins v. Indiana Lumbermen's Mut. Ins. Co.*, 234 S.W.2d 430, 431 (Tex. Civ. App. 1950, no writ).

Additionally, the statute is unambiguous — the bond is mandatory. Therefore, the insurer plaintiffs, who are seeking to defend the state court action through this proceeding (See Defendants' Motions to Dismiss) must file the required bond before being entitled to file *any pleading*. Tex. Ins. Code Ann. art. 1.36 § 11. In the state court action, the bond was to have been filed before the answer date or the unauthorized insurers risk default judgment. In this case, Gisentaner has filed cross motions for summary judgment on issues which are partially determinative of the insurers' liability in the state court action. The insurers' motions for summary judgment are also an attempt to avoid liability in the state court action. In essence, these unauthorized insurers engaged in blatant forum shopping in what proved to be a race to the courthouse to avoid having Texas courts rule on issues under purely Texas law. These insurers should not be permitted to avoid the requirement of Texas Insurance Code requiring proof of financial responsibility prior to litigating their liability through such conduct.

Courts in other jurisdiction agree that when the unauthorized insurer fails to post the requisite bond, the court may strike the insurers pleadings. *Akron Co. v. Fidelity Gen. Ins. Co.*, 250 F.Supp. 201 (N.D. Ohio 1964) (construing the Ohio statute which is also based on the Uniform Unauthorized Insurers Process Act).

IV.

Plaintiffs may argue that they are authorized surplus lines carriers and therefore exempt from the financial responsibility requirement of the Texas Insurance Code pursuant to art. 1.14-1(b) (1). However, in order to qualify for this exemption, the Plaintiffs have the burden of establishing that they are authorized surplus lines insurance carriers pursuant to art. 1.14-2, and that the surplus lines insurance which was sold to Valsamis, Inc. meets the requirements of art. 1.14-2.

In order to do so, Plaintiffs must establish that certain requirements were met *at the time* the insurance was sold to Valsamis, Inc., not today. Furthermore, at least one of the Plaintiffs, Americas Insurance Co., does not meet the requirement of art. 1.14-2, § 7, which requires that every "cover note . . . procured and delivered as a surplus lines coverage pursuant to this article shall . . . have stamped or affixed upon it in 11 point type the following:

> This insurance contract is with an insurer not licensed to transact insurance in this state and is issued and delivered as a surplus line coverage pursuant to the Texas Insurance Statutes. The State Board of Insurance does not audit the finances or review the solvency of the surplus lines insurer providing this coverage and the insurer is not a member of the Property and Casualty Insurance Guaranty Association created under art. 21.28-c. Article 1.14-2 Insurance Code requires payment of ____% (insert appropriate tax rate tax) tax on gross premiums.

The Americas Policy does not contain this disclaimer on the covernote of the policy.

Section 1.14-2. Contains other requirements that the broker for surplus liens coverage must comply with at the time the insurance is sold, including an affidavit to be filed with the state board of insurance that coverage was not available from any licensed insurer. Plaintiffs have failed to demonstrate that nay of the requirements of Section. 1.14-2 have met. In order for Plantiffs to avoid the requirement that they provide proof of financial responsibility to this court and in the state court action, a factual determination must be made by either this Court, or the 129th District court of Harris County, that Plaintiffs have met all of the requirements of Section 1.14-2. Because the Texas Insurance Code makes proof of financila responsibililty through the filing of a bond mandatory, it may be raised at any time in the trial court. See *Mt. Hwaley Ins. Co. v. Ragland*, 1991 WL 159193 (Tx. App.-Austin, 1991), (opinion withdrawn 1991).[2]

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2. The Opinion was withdrawn pursuant to a post opinion settlement.

Thus, the Texas Insurance Code mandates that this Court require Plaintiffs to comply with the statute by posting bond as proof of financial responsibility before it can consider the complaints or motions for summary judgment of all plaintiffs before the Court because they are all unauthorized, surplus lines, insurers. If Plaintiffs fail to comply immediately, this court should then strike all the pleadings of the non-complying Plaintiffs, and dismiss this action.

WHEREFORE, PREMISES CONSIDERED, Defendant Gisentaner individauly and on behalf of Valsamis, Inc., requests that this Court dismiss Plaintiffs' complaints. In the alternative, Defendants request that this Court require Plaintiffs to post bond as proof of financial responsibility before permitting them to proceed before this Court. Defendants pray for such further relief to which they may show themselves justly entitled.

Respectfully submitted,

JOAN LUCCI BAIN, P.C.

By:/s/Joan M. Lucci Bain
JOAN M. LUCCI BAIN
Texas Bar No. 01548020
Federal Adm. No. 67
Three Riverway, Suite 950
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Houston, Texas 77279

ATTORNEY FOR DEFENDANT
CHERYL GISENTANER

RULE 6B CERTIFICATE OF CONFERENCE

This is to certify pursuant to Local Rules of this Court that I have conferred with all counsel of record in this action to determine whether they are opposed to the granting of the motion.
Plaintiffs is opposed to the filing of this Motion.

/s/Joan M. Lucci Bain
JOAN M. LUCCI BAIN

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent by facsimile and/or by mail, certified, return receipt requested to:

Glenn R. Legge, Esq.
Sylvia Sydow, Esq.
Bell & Murphy
1300 Post Oak Boulevard, Suite 2000
Houston, Texas 77056-3809

Julia Adams, Esq,
Karen Milhollin, Esq.
Phelps Dunbar
1331 Lamar, Suite 501
Houston, Texas 77010

Ronald L. White, Esq.
Rodney Baham, Esq.
Brown, Sims, Wise & White
2000 Post Oak Boulevard, 21st Floor
Houston, Texas 77056-4496

George M. Kuhn, Jr., Esq.
1177 West Loop South, Suite 1725
Houston, Texas 77027

on this 14th day of August, 1995.

/s/Joan M. Lucci Bain
JOAN M. LUCCI BAIN

VERIFICATION

THE STATE OF TEXAS §

COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared Joan M. Lucci Bain, who being by me duly sworn on her oath deposed and said that she is the attorney of record for Plaintiff in the above entitled and numbered cause; that she has read Defendant Cheryl Gisentaner's Supplement to the Motions to Dismiss Cornhill Insurance Plc., Americas Insurance Co. and Ocean Marine Indemnity Co. in the above and foregoing cause and that every statement contained therein is within her personal knowledge and true and correct.

/s/Joan M. Lucci Bain
JOAN M. LUCCI BAIN

SUBSCRIBED AND SWORN TO before me on this 14th day of August, 1995.

/s/illegible
NOTARY PUBLIC in and for the
STATE OF TEXAS

MARCELYN MILLER
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
NOV. 20, 1996

APPENDIX O

CLOSED APPEAL

U.S. DISTRICT COURT
TXS - SOUTHERN DISTRICT OF TEXAS (HOUSTON)

CIVIL DOCKET FOR CASE #: 94-CV-1013

FILED: 03/28/94
NATURE OF SUITE: 110
JURISDICTION: FEDERAL QUESTION

Cornhill Insurance, et al v. Valsamis Inc. et al
Assigned to: Judge David Hittner
Demand: $0,000
Lead Docket: None
Dkt # in MEMBER CASE : is 4:94-cv-01977
Dkt # in MEMBER CASE : is 4:94-cv-01336

Cause: 28 : 1332 Diversity-Insurance Contract

CORNHILL INSURANCE PLC
plaintiff

Glenn R. Legge
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[COR LD NTC]
Bell & Murphy
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Houston, Tx 77056
713-871-86700

Sylvia J. Sydow
713-871-6767
[COR LD NTC]
Bell & Murphy
1300 Post Oak Blvd., Ste 2000
Houston, Tx 77056
713-871-86700

HANSA MARINE INS CO, (UK) Ltd plaintiff	Glenn R. Legge (See above) [COR LD NTC] Syliva J. Sydow (See above) [COR LD NTC]
ANGLO AMERICAN INSURANCE COMPANY LTD plaintiff	Glenn R. Legge (See above) [COR LD NTC] Syliva J. Sydow (See above) [COR LD NTC]
THE UNDERWITERS AT LLOYDS LONDON plaintiff	Glenn R. Legge (See above) [COR LD NTC]
PRUDENTIAL ASSURANCE COMPANY, LTD plaintiff	Glenn R. Legge (See above) [COR LD NTC]
ALLIANZ INTERNATIONAL INSURANCE COMPANY, LTD plaintiff	Glenn R. Legge (See above) [COR LD NTC]
VESTA (UK) INSURANCE COMPANY, LTD plaintiff	Glenn R. Legge (See above) [COR LD NTC]
NORTHERN ASSURANCE COMPANY OF AMERICA plaintiff	Glenn R. Legge (See above) [COR LD NTC]

Docket as of January 9, 1996 10:35 am

Proceedings include all events. CLOSED APPEAL
4:94cv1013 Cornhill Insurance, et al v. Valsamis Inc. et al

SPHERE DRAKE INSURANCE PLC plaintiff	Glenn R. Legge (See above)
[COR LD NTC]	
SOVEREIGN MARINE & GENERAL INSURANCE COMPANY LTD plaintiff	Glenn R. Legge (See above) [COR LD NTC]
TOKIO MARINE & FIRE plaintiff	Glenn R. Legge (See above)
[COR LD NTC]	
AMERICAS INSURANCE COMPANY consolidated plaintiff	Julia M. Adams 713-659-1388 [COR LD NTC] Phelps Dunbar 1331 Lamar, Ste 501 Houston, TX 77010 713-659-1386
OCEAN MARINE INDEMNITY CO consolidated plaintiff	Ronald L. White 713-629-5027 [COR LD NTC] Brown Sims Wise & White 2000 Post Oak Blvd. Ste. 2100 Houston, TX 77056-4496 629-1580

Docket as of January 9, 1996 10:35 am

Proceedings include all events. CLOSED APPEAL
4:94cv1013 Cornhill Insurance, et al v. Valsamis Inc. et al

v.

VALSAMIS INC.
defendant

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[COR LD NTC]
Attorney at Law
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Ste. 1725
Houston, TX 77027
713-840-0174

INTERESTED UNDERWRITERS ON POLICY NOS., 92/353/085, 92/2084/166 AND 92/2804/167
movant

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Houston, TX 77056
713-871-6700

CHERYL GSENTANER
defendant

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(COR LD NTC)
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4th Flr
Houston, Tx 77027
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Docket as of January 9, 1996 10:35 am

Proceedings include all events. CLOSED APPEAL
4:94cv1013 · Cornhill Insurance, et al v. Valsamis Inc. et al

CORNHILL INSURANCE PLC: HANSA MARINE INS CO, (UK) Ltd; ANGLO AMERICAN INSURANCE COMPANY LTD; THE UNDERWRITERS AT LLOYDS LONDON; PRUDENTIAL ASSURANCE COMPANY LTD; ALLIANZ INTERNATIONAL INSURANCE CO LTD; VESTA (UK) INSURANCE COMPANY LTD; NORTHERN ASSURANCE COMPANY OF AMERICA; SPHERE DRAKE INSURANCE PLC; SOVEREIGN MARINE & GENERAL INSRUANCE COMPANY LTD; TOKIO MARINE & FIRE;

plaintiff

AMERICAS INSURANCE COMPANY; OCEAN MARINE INDEMNITY CO

consolidated plaintiff

v.

VALSAMIS INC.

defendant

INTERESTED UNDERWRITERS ON POLICY NOS. 92/353/085, 92/2804/166 AND 92/2804/167

movant

CHERYL GISENTANER

defendant

Docket as of January 9, 1996 10:35 am

Proceedings include all events. CLOSED APPEAL
4:94cv1013 Cornhill Insurance, et al v. Valsamis Inc. et al

3/28/94	1	58	COMPLAINT filed; FILING FEE $120 RECEIPT #435162 (ad) [Entry date 03/29/94]
3/28/94	2	59	ORDER set scheduling conference for 11:00 6/3/94, entered; Parties notified. (signed by Judge David Hittner) (ad) [Entry date 03/29/94]
5/9/94	3	60	WAIVER OF SERVICE Returned Executed as to Valsamis Inc 5/3/94; Answer due on 7/2/94 for Valsamis Inc, filed. (nd) [Entry date 05/11/94]
5/23/94	4	66	Report of Meeting and Joint Discovery/Case Management Plan by Cornhill Insurance, Hansa Marine Ins Co, Anglo American Ins and Valsamis Inc, filed. (nd) [Entry date 05/26/94]
6/2/94	6	69	Unopposed MOTION to extend time to respond to complaint 6/15/94 by Valsamis Inc Motion Docket Date 6/22/94 [6-1] motion, filed. (nd) [Entry date 06/06/94]
6/2/94	7	72	MOTION to add Sylvia J Sydow (TBN 19592050) as counsel by Cornhill Insurance, Hansa Marine Ins Co and Anglo American Ins, Motion Docket Date 6/22/94 [7-1] motion, filed. (nd) [Entry date 06/97/94]
6/3/94	5	67	SCHEDULING ORDER entered setting Joining of parties, amending of pleadings 1/15/95; Pltf's Expert witness list submitted by 1/15/95; Deft's Expert witness list submitted by 2/15/95; Discovery cutoff 3/15/95; Deadline for filing all dispositive motions 6/1/95; Deadline for filing non-dispositive motions 6/1/95; Pretrial order to be submitted on or before 6/20/95; Trial Term: July/Aug 1995. Parties notified. (Signed by Magistrate Judge Marcia A. Crone) (nd) [Entry date 06/06/94]

Docket as of January 9, 1996 10:35 am

Proceedings include all events. CLOSED APPEAL
4:94cv1013 Cornhill Insurance, et al v. Valsamis Inc. et al

6/6/94	8	73	Scheduling conference held before Magistrate Judge Marcia A. Crone; Tape Number: 060394macl; Appearances: Sylvia Sydow f/pltf; G Kirby f/deft; Scheduling order entered; Partis to advise by 6/10/94 if willing to consent (nd) [Entry date 06/06/94]
6/10/94	9	74	ORDER granting Pltfs' [7-1] motion for addition of Sylvia J Sydow as counsel, (TBN 19592050) as counsel, entered; Parties notified. (signed by Judge David Hittner) (ks) [Entry date 06/13/94]
6/10/94	10	75	ORDER granting Deft Valsamis, Inc's [6-1] motion to extend time to respond to complaint 6/15/94 reset answer due for 6/15/94 for Valsamis Inc, entered; Parties notified. (signed by David Hittner) (ks) [Entry date 06/13/94]
6/15/94	11	83	ANSWER to Complaint by Valsamis Inc, filed. (nd) [Entry date 06/17/94]
6/15/94	12	112	MOTION to dismiss by Valsamis Inc, Motion Docket Date 7/5/94 [12-1] motion, filed, (nd) [Entry date 06/17/94]
6/22/94	13	210	AMENDED COMPLAINT by Cornhill Insurance, Hansa Marine Ins Co and Anglo American Ins. (Answer due 7/2/94 for Valsamis Inc) amending [1-1] complaint adding Cheryl Gisentaner, FILED (ORDER ENTERED STRIKING AMENDED COMPLAINT - LEAVE OF COURT NOT GIVEN) (nd) (Entry date 06/23/94) [Edit date 06/30/94)
6/24/94	--		SUMMONS/amended complaint issued for Cheryl Gisentaner (nd)
6/29/94	14	211	RETURN OF SERVICE executed as to Cheryl Gisentaner on 6/24/94, filed; Answer due on

Proceedings include all events. CLOSED APPEAL
4:94cv1013 Cornhill Insurance, et al v. Valsamis Inc. et al

			7/14/94 for Cheryl Gisentaner (nd) [Entry Date 06/30/94]
6/29/94	15	212	ORDER entered STRIKING pltf's [13-1] amended complaint; Leave of Court not given; Parties notified. (signed by Judge David Hittner) (nd) [Entry date 06/30/94
7/8/94	16	216	AGREED MOTION for leave to file first amended [1-1] comlplaint by Cornhill Insurance Hansa Marine Ins Co, Anglo American Ins, Motion Docket Date 7/28/94 [16-1] motion, filed. (original document attached and filed) (ph)
7/8/94	17	284	FIRST AMENDED COMPLAINT by Cornhill Insurance, Hansa Marine Ins Co, Anglo America Ins, (Answer due 7/18/94 for Cheryl Gisentaner, for Valsamis Inc) amending [1-1] complaint, filed. (ph)
7/8/94	--		SUMMONS isued (ph)
7/8/94	18	289	RESPONSE by Cornhill Insurance and Hansa Marine Ins Co and Anglo American Ins in opposition to [12-1] motion to dismiss, filed (nd) [Entry date 07/11/94]
7/13/94	19	290	ORDER entered GRANTING pltfs' [16-1] agreed motion for leave to file first amended [1-1] complaint; Parties notified. (signed by Judge David Hittner) (nd) [Entry date 07/14/94]
7/14/94	20	326	MOTION to dismiss by Cheryl Gisentaner, Motion Docket Date 8/3/94 (20-1) motion, filed. (nd) [Entry date 07/15/94)
7/14/94	21	335	ANSWER by Cheryl Gisentaner to amend complaint, filed. (nd) [Entry date 07/15/94]
8/3/94	22	352	RESPONSE by Cornhill Insurance, Hansa Marine Ins Co Anglo amd American Ins to Gisentaner's (20-1) motion to dismiss, filed. (nd) [Entry date 08/04/94]

Docket as of January 9, 1996 10:35 am

Proceedings include all events. CLOSED APPEAL
4:94cv1013 Cornhill Insurance, et al v. Valsamis Inc. et al

8/11/94	23	354	Notice of change of address by Joan Bain atty for Cheryl Gisentaner, filed. (nd)
8/24/94	24	355	ORDER Motion hearing set for 9:00 9/19/94 for [20-1] motion to dismiss, set for 9:00 9/19/94 for [12-1] motion to dismiss, entered; Parties notified. (signed by Judge David Hittner) (ks) [Entry date 08/25/94]
9/19/94	25	356	Minute entry filed following Motion Hearing held before Judge David Hittner; Terminated deadlines; Appearances; S. Sydow f/pltf; G Kunn and J Bain f/defts; Parties to file motion to consolidate; Re: motion to dismiss - order to issue; Rule 16 order abated; Set scheduling conference for 9:30 10/27/94 before Judge David Hittner; Ct Reporter: Sanchez (nd) [Entry date 09/21/94]
9/19/94	26	368	MOTION to consolidate cases 94-1013 with 94-1336, 94-1977 by Cheryl Gisentaner, Motion Docket Date 10/9/94 [26-1] motion, filed. (nc) [Entry date 10/20/94]
10/20/94	27	372	ORDER entered GRANTING defts' [26-1] motion to consolidate cases 94-1013 with 94-1336, 94-1977; Case nos 94-1336 and 94-1977 are ADMINISTRATIVELY CLOSED; All pending motions in said cause nos are DENIED w/o prejudice as to refile consolidation motions under 94-1013; Parties notified. (signed by Judge David Hittner) (nd) [Entry date 10/25/94]
10/20/94	--		Consolidated Lead Case (nd) [Entry date 10/25/94]
10/26/94	28	375	MOTION for leave to file second amended [1-1] complaint by Anglo American Ins, Hansa Marine Ins Co and Cornhill Insurance, Motion Docket 11/15/94 [28-1] motion, filed. (nd) [Entry date 10/28/94]

Docket as of January 9, 1996 10:35 am

Proceedings include all events. CLOSED APPEAL
4:94cv1013 Cornhill Insurance, et al v. Valsamis Inc. et al

10/26/94	29	497	SECOND AMENDED COMPLAINT by Angelo American Ins. Hansa Marine Ins Co Underwriters at Lloyds, Prudential Assurance, Allianz Int'l, Vesta Ins Co, Northern Assurance, Sphere Drake Ins, Sovereign Marine & General Ins, Tokio Marine & Fire Ins and Cornhill Insurance, (Answer due 11/5/94 for Valsamis Inc and Cheryl Gisentaner) amending [1-1] complaint, filed 9nd) [Entry date 10/28/94] [Edit date 11/01/94]
10/27/94	30	498	ORDER entered GRANTING pltfs']28-1] motion for leave to file second amended [1-1] complaint; Parties notified. (signed by Judge David Hittner) (nd) [Entry date 10/28/94]
10/27/94	31	499	Minute entry filed following Scheduling Conference held before Judge David Hittner; Terminated deadline; Ct Reporter: Reed; Appearances: S Sydow and J Adams f/pltf; G Kuhn, Mr. Bahan and J Bain f/defts; Amended Rule 16 Order entered (nd) [Entry date 10/31/94]
10/27/94	32	500	AMENDED SCHEDULING ORDER entered setting Joining of parties, amending of pleadings 11/4/94; Pltf's expert witness list submitted by 3/1/95; Discovery cutoff 6/15/95; Deadline for filing all dispositive motions 7/17/95; Deadline for filing non-dispositive motions 7/17/95; Pretrial order to be submitted on or before 9/22/95; before Judge David Hittner; ETT; 3-4 days; Trial Term; Nov/Dec 1995. Parties notified. (Signed by Judge David Hittner) (nd) [Entry date 10/31/94]
1/11/95	33	707	MOTION for summary judgment by Americas Ins Co, Motion Docket Date 1/31/95 [33-1] motion, filed. (nd) [Entry date 01/12/95]

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1/11/95	34	711	BRIEF by Americas Ins Co in support of [33-1] motion for summary judgment, filed. (nd) [Entry date 01/12/95]
1/20/95	35	714	Notice of change of address by Valsamis Inc for atty of record George Ruhn Jr to 1177 W Loop South Ste 1725 Houston TX 77027, filed; copy forwarded to Atty Adm. (nd) [Entry date 01/23/95]
1/27/95	36	719	Unopposed MOTION to extend time to respond to pltf's motion for summary judgment until 2/28/95 by Cheryl Gisentaner and Valsamis Inc, Motion Docket Date 2/16/95 [36-1] motion, filed. (nd) [Edit date 01/27/95]
1/30/95	37	720	ORDER entered GRANTING defts' [36-1] unopposed motion to extend time to respond to pltf's motion for summary judgment until 2/28/95; Response to motion reset to 2/28/95 for [33-1] motion for summary judgment; Parties notified. (signed by Judge David Hittner) (nd) [Entry date 02/01/95]
2/27/95	38	725	MOTION for extension of deadline for designating experts by Underwriters Lloyds, Motion Docket Date 3/19/95 [38-1] motion, filed. (nd) [Entry date 02/28/95]
2/28/95	39	726	ORDER granting [38-1] motion for extension of deadline for designating experts reset pltfs expert witness list due for 5/1/95, reset defts witness list for 6/2/95, entered; Parties notified. (signed by Judge David Hittner) (ck) [Entry date 03/01/95]
2/28/95	40	844	RESPONSE by Cheryl Gisentaner, Valsamis Inc to Pltf America's [33-1] motion for summary judgment and CROSS-MOTION, for summary judgment, Motion Docket Date 3/20/95 [40-2] motion, filed (fs) [Entry date 03/01/95]

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3/2/95	45	865	Unopposed MOTION for extension of deadline for filing expert witnesses by Americas Ins Co, Motion Docket Date 3/22/95 [45-1] motion, filed. (nd) [Entry date 03/24/95]
3/17/95	41	847	AFFIDAVIT of Beverly B Lord, filed (nd) [Entry date 03/20/95]
3/17/95	--		Proposed Order granting deft Gisentaner's motion for summary judgment rec'd and forwarded to CRD (nd) [Entry date 03/20/95]
3/21/95	42	850	MOTION to extend time to respond to cross-motion for summary judgment to 3/22/95 by Americas Ins Co, Motion Docket Date 04/10/95 [42-1] motion, filed. (la) [Entry date 03/22/95]
3/21/95	43	851	ORDER entered GRANTING Americas Ins Co's [42-1] motion to extend time to respond to cross-motion for summary judgment to 3/22/95; re-setting response to 3/22/95 for [40-2] motion for summary judgment; Parties notified. (by Judge David Hittner) (nd) [Entry date 03/23/95]
3/22/95	44	865	RESPONSE by Americas Ins Co to defts' [40-2] cross motion for summary judgment, filed. (nd) [Entry date 03/30/95]
3/29/95	46	1024	MOTION for summary judgment by Anglo American Ins, Hansa Marine Ins Co and Cornhill Insurance, Motion Docket Date 4/18/95 [46-1] motion, filed. (nd) [Entry date 03/30/95]
4/11/95	47	1028	MOTION to extend time to respond to motion for summary judgment until 5/2/95 filed by Cheryl Gisentaner and on behalf of Valsamis Inc, Motion Docket Date 5/1/95 [47-1] motion (nd) Entry date 04/12/95]
4/11/95	48	1029	ORDER granting [47-1] motion to extend time to respond to motion for summary judgment until

			5/2/95 Response to motion reset to 5/2/95 for [40-2] motion Motion Docket Date 3/20/95 [40-2] motion, entered; Parties notified. (signed by Judge David Hittner) (ym) [Entry date 04/14/95]
4/18/95	49	1193	AMENDED MOTION for summary judgment by pltfs Anglo American Ins. Hansa Marine Ins Co et al filed. Motion Docket Date 5/8/95 [49-1] motion. (nd) [Entry date 04/19/95]
4/28/95	50	1194	ORDER entered GRANTING pltfs' [45-1] motion for extension of deadline for filing expert witnesses; RESETTING pltfs' expert witness list due by 8/29/95; RESETTING discovery due for 9/30/95; RESETTING dispositive motion filing deadline for 10/15/95; RESETTING non-dispositive motion filing deadline for 10/15/95; RESETTING pretrial order due for 10/15/95; all other deadlines set out in Court's 10/27/95 Amended Scheduling Order remain unchanged; Parties notified. (signed by Judge David Hittner) (nd) [Entry date 05/02/95]
4/28/95	51	1199	Unopposed MOTION for extension of scheduling order deadline for naming experts by Underwriters Lloyds et al, Motion Docket Date 5/18/95 [51-1] motion, filed. (nd)
5/1/95	52	1210	MOTION to extend time to respond to pltfs' motion for summary judgment until 6/5/95 by Cheryl Gisentaner and Valsamis Inc, Motion Docket Date 5/21/95 [52-1] motion, filed, (nd) [Entry Date 05/02/95]
5/1/95	53	1211	ORDER entered GRANTING defts' [52-1] motion to extend time to respond to pltfs' motion for summary judgment until 6/5/95; RESETTING response 6/5/95 for [46-1] motion for

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		summary judgment; Parties notified. (signed by Judge David Hittner) (nd) [Entry date 05/02/95]
6/5/95	54 1062	RESPONSE by Cheryl Gisentaner and Valsamis Inc to [46-1] motion for summary judgment, filed. (nd) [Entry date 06/07/96]
6/5/96	54 1602	CROSS MOTION w/exhibits attached for summary judgment by Cheryl Gisentaner and Valsamis Inc filed, Motion Docket Date 6/25/95 [54-1] cross motion, filed. (fs) [Entry date 07/06/95]
6/30/95	55 1607	UNOPPOSED MOTION to extend time to respond to deft's cross motion for summary judgment by Interested Underw, Motion Docket Date 7/20/95 [55-1] motion, filed. (fs) [Entry date 07/06/95]
7/7/95	56 1608	ORDER granting pltfs' [55-1] motion to extend time to respond to deft's cross motion for summary judgment Response to reset to 7/7/95 for [54-1] cross motion for summary judgment, entered; Parties notified. (signed by Judge David Hittner) (fs) [Entry date 07/11/95]
7/7/95	57 1630	REPLY by Anglo American Ins, Hansa Marine Ins Co, Cornhill Insurance to response to [49-1] motion for summary judgment filed (nd) [Entry date 07/11/95]
7/7/95	57 1630	RESPONSE by pltfs Anglo American Ins, Hansa Marine Ins Co et al to [54-1] cross motion for summary judgment, filed (nd) [Entry date 07/11/95)
7/7/95	58 1635	MOTION to expedite consideraton of all motions for summary judgment by pltfs Anglo American Ins, Hansa Marine Ins Co et al filed, Motion Docket Date 7/27/95 [58-1] motion. (nd) [Entry date 07/11/95]

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7/11/95	59	1634	JOINDER by Americas Ins Co in support of [58-1] motion to expedite consideration of all motions for summary judgment filed (nd) [Entry date 97/11/95]
7/17/95	60	1786	MOTION for summary judgment by Ocean Marine filed, Motion Docket Date 8/6/96 [60-1] motion. (nd) [Entry date 07/18/95]
7/27/95	61	1791	UNOPPOSED MOTION to extend time to designate expert witnesses by Underwriters Lloyds, Motion Docket Date 8/16/95 [61-1] motion, filed. (ph) [Entry date 08/04/95]
8/3/95	62	1792	ORDER that Pltfs' Unopposed Motion to Extend Time is GRANTED and that all Pltfs will be required to designate expert witnesses no later than 9/28/95, with all Defts being ordered to designate expert witnesses no later than 10/28/95, entered; parties notified, (signed by Judge David Hittner((ks) [Entry date 08/04/95]
8/10/95	64	1799	MOTION to extend time to respond to motion for summary judgment 8/14/95 by Cheryl Gisentaner and Valsamis Inc filed, Motion Docket Date 8/30/95 [64-1] motion. (nd) [Entry date 08/16/95]
8/14/95	63	1793	ORDER granting defts Gisentaner and Valsamis' unopposed motion for extension of time to respond to pltf Ocean's motion for summary judgment; Response to motion reset to 8/14/95 for [60-1] motion for summary judgment, entered; Parties notified. (signed by Judge David Hittner) (fs) [Entry date 08/15/95]
8/14/95	67	1915	RESPONSE by Cheryl Gisentaner and Valsamis Inc to [60-1] motion for summary judgment, filed, (nd) [Entry date 08/21/95]

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8/14/9	67 1915	CROSS MOTION for summary judgment by Cheryl Gisentaner and Valsamis Inc filed, Motion Docket Date 9/3/95 [67-1] cross motion. (nd) [Entry date 08/21/95]
8/15/95	66 1620	SUPPLEMENT to [20-1] motion to dismiss by Cheryl Gisentaner, filed. (fs) [Entry date 08/18/95]
8/16/95	65 1800	ORDER granting Deft's [64-1] motion to extend time to respond to motion for summary judgment 8/14/95, Response to motion reset to 8/14/95 for [60-1] motion for summary judgment, entered; Parties notified. (signed by Judge David HIttner (hs) [Entry date 09/05/95]
9/1/95	68 1800	RESPONSE by Americas Ins Co to supplement to [20-1] motion to dismiss, filed. (nd) [Entry date 08/17/95]
9/1/95	69 1957	RESPONSE by Underwriters Lloyds to supplement to [20-1] motion to dismiss, filed. (nd) [Entry date 09/05/95]
9/11/95	--	Notice of change of address by counsel for Cheryl Gisentaner and Valsamis Inc rec'd; forwarded copy to Atty Adm. (nd)
9/11/95	70 1974	RESPONSE by Ocean Marine in opposition to [67-1] cross motion for summary judgment, filed (nd) [Entry date 09/12/95]
9/26/95	71 1977	MOTION for extension of scheduling order deadlines by Cheryl Gisentaner and Valsamis Inc filed. Motion Docket Date 10/16/95 [71-1] motion. (nd) [Entry date 09/27/95]
9/26/96	72 1990	ORDER entered GRANTING Americas Ins Co's [33-1] motion for summary judgment; DENYING dfts' [40-2] motion for summary judgment, [54-1] cross motion for summary judgment, [67-1] cross

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			motion for summary judgment; and [66-1] supplement to motion to dismiss; GRANTING Cornhill et al's [46-1] motion for summary judgment and [49-1] motion for summary judgment; GRANTING Ocean Marine's [60-1] motion for summary judgment; Parties notified. (signed by Judge David Hittner) (nd) [Entry date 09/28/95]
9/26/95	73	1992	ORDER entered GRANTING summary judgment in favor of pltfs; this is a FINAL JUDGMENT. Parties notified. (signed by Judge David Hittner) (nd) [Entry date 09/28/95]
9/26/95	--		Case closed (nd) [Entry date 09/28/95]
10/18/95	74	1995	NOTICE OF APPEAL of [73-1] order by Cheryl Gisentaner filed. Fee Status: no paid (jd) [Entry date 10/23/95]
10/23/95	--		Notice of appeal and certified copy of docket transmitted to USCA: [74-1] appeal (jd)
10/25/95	--		USCA appeal fees received $ 105.00 Receipt #: 126212 [74-1] appeal Parteis ntfd. (jd) [Entry date 10/26/95
10/26/96	75	1996	Transcript request for [74-1] appeal advising transcript uncecessary by deft, filed. (nd) [Entry date 10/27/95]
11/3/95	--		NOTICE of Docketing NCA from USCA Re: [74-1] appeal USCA NUMBER: 95-20898 (jd)
1/9/96	--		Certified and transmitted record on appeal consisting of 11 volumes of original pleadings (8 of CA-94-1013, 1 of 94-1336 and 2 of 94-1977) to U.S. Court of Appeals: [71-1] appeal. Circuit No. 95-20898 Parties ntfd. (jd)

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APPENDIX P

CLOSED

U.S. DISTRICT COURT
TXS - SOUTHERN DISTRICT OF TEXAS (HOUSTON)

CIVIL DOCKET FOR CASE #: 94-CV-1977

Ocean Marine v. Valsamis Inc, et al
Assigned to: Judge David Hittner
Demand: $0,000
Lead Docket: None
Dkt # in other court: None

FILED: 06/10/94
Nature of Suite: 110
Jurisdiction: Diversity

Cause: 28 : 1332 Diversity-Insurance Contract

OCEAN MARINE INDEMNITY CO
plaintiff

Ronald L White
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(COR LD NTC)
Brown Sims Wise & White
2000 Post Oak Blvd
Ste 2100
Houston TX 77056-4496
629-1580

v.

VALSAMIS INC
defendant

Joan M Lucci Bain
713-629-6226
(COR LD NTC)
Bain & Bain
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4th Fir
Houston, Tx 77027
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CHERYL GISENTANER
defendant

Joan M Lucci Bain
(See above)
(COR LD NTC)

OCEAN MARINE INDEMNITY CO
plaintiff

v.

VLASAMIS INC; CHERYL GISENTANER
defendant

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6/10/94	1	119	COMPLAINT filed; FILING FEE $ 120 RECEIPT # 437874 (ad) [Entry date 05/14/94
6/10/94	--		SUMMONS issued for Valsamis Inc, Cheryl Gisentaner (ad) [Entry date 06/14/94]
6/10/94	2	120	ORDER set scheduling conference for 9:00 10/11/94, entered; Parties notified. (signed by Chief Judge Norman W. Black) (ad) [Entry date 06/14/94]
7/22/94	3	121	WAIVER OF SERVICE Returned Executed as to Dimitrios Valsamis President for Valsamis Inc 7/14/94, filed. (hs) [Entry date 07/25/94]
8/4/94	4	122	WAIVER OF SERVICE Returned Executed as to Cheryl Gisentaner 7/25/94, filed, (hs)
8/22/94	5	125	UNOPPOSED MOTION to extend time to respond/answer to complaint by Valsamis Inc, Cheryl Gisentaner, Motion Docket Date 9/11/94 [5-1] motion, filed. (hs) [Entry date 08/23/94]
8/25/94	6	126	ORDER granting Defts [5-1] motion to extend time to respond/answer to complaint. Set answer due for 8/29/94 Cheryl Gisentaner, for Valsamis Inc, entered, Parties notified. (signed by Chief Judge Norman W. Black) (hs)
8/29/94	7	135	ANSWER to Complaint by Cheryl Gisentaner, (Added attorney), filed. (hs)
8/29/94	8	147	MOTION to dismiss by Cheryl Gisentaner, Motion Docket Date 9/18/94 [8-1] motion filed. (hs)
8/29/94	9	150	ANSWER to Complaint by Valsamis Inc (Added attorney George N Kuhn Jr), filed. (hs) [Entry date 08/30/94]
8/29/94	10	167	MOTION to dismiss by Valsamis Inc, Motion Docket Date 9/18/94 [10-1] motion, filed. (hs) [Entry date 08/30/94]

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9/15/94	--		Rec'd Agreement for Valsamis, Inc., and Cheryl Gisentaner extending deadline for Ocean Marine Indemity Co to respond to Mtn to Dismss, fwd to CRD. (hs) [Entry date 09/16/94]
10/3/94	11	175	Report of Meeting and Joint Discovery/Case Management Plan by Cheryl Gisentaner, Valsamis Inc, Ocean Marine, filed. (hs) [Entry date 10/04/94]
10/3/94	12	190	RESPONSE by Ocean Marine to]8-1] motion to dismiss, [10-1] motion to dismiss, filed. (hs) [Entry date 10/4/94]
10/20/94	13	192	ORDER Case is administratively closed. All pending motions are DENIED without prejudice as to refile consolidated motions under civil actions No. 94-1013, denying [8-1] motion to dismiss denying [10-1] motion to dismiss, entered; Parties notified. (signed by Judge David Hittner) (hs) [Entry date 10/25/94]
10/20/94	--		Consolidated Member Case Lead Case Number: 94-1013 (hs) [Entry date 10/25/94]
10/21/94	14	193	NOTICE OF TRANFER (to Judge David Hittner) Consol with 94-1013, filed, Parties notified, (hs) [Entry date 10/25/94]
10/21/94	--		CASE reassigned to Judge David Hittner (hs) [Entry date 10/25/94]
10/21/94	--		Case closed (hs) [Entry date 10/25/94]
9/25/95	--		Certified copy of ORDER entered GRANTING pltfs' motions for summary judgment; Parties notified. (signed by Judge David Hittner) (Original Order placed in H-94-1013) (nd) [Entry date 09/28/95]

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